



*C2D – Centre for Research on Direct Democracy  
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# **The Development of Direct Democracy Mechanisms in Poland**

**Hanna BEDNARZ**

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## ABSTRACT

This working paper analyzes the development of the direct democracy institutions in Poland using the critical junctures and path dependence methodology. These institutions have been present in the Polish constitutional law scholarship since the beginning of the 20<sup>th</sup> century. Their introduction into the law was nevertheless a difficult compromise between the political actors. Throughout the past century, direct democracy mechanisms were seldom used, partly due to the fact that the citizens were not allowed to make a final decision as to their application. As the study shows, the current legislation on direct democracy is still rooted in the Communist times and marked by the Legislature's and Executive's deep distrust in the people's ability to make conscious decisions.

## KEY WORDS

Direct democracy, referendum, plebiscite, popular initiative, Poland

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## 1 Introduction

The study of path dependence has been successfully applied in research in the fields of economy, social science or political science. Despite being an important trend in analyzing how the past can influence the current processes, this method is not yet a popular research tool within the legal scholarship. This study aims at applying the critical juncture and path dependence formulas to the analysis of the development of the direct democracy institutions in Poland and their entrenchment in laws. As this method proved to be useful in estimating the genesis of the institutions, when applied to the legal structure of direct democracy, it helps to point out the events that are responsible for the current state of those institutions in Poland and at the same time, it reaches further than merely stating that the past affects the future.

When analyzing the development of the direct democracy institutions in modern Poland, it is necessary to point out three moments in the 20<sup>th</sup> century history that were crucial for shaping the referendums and popular initiatives as we know them today. Those were the phases or moments in time which initiated sequences of events that resulted in introducing and shaping the legal structure of direct democracy. Those key points in Polish 20<sup>th</sup> century history set the direction in relation to these institutions, made it more probable for the institution to follow a particular path of development and at the end - affected the outcome.

Using the construct of the path-dependent analysis, the description of the development of direct democracy institutions is divided in this research into phases, namely: antecedent (initial) conditions, critical junctures, production phases, reproduction phases, reactive sequences (which do not always occur but when they do, they tend to replace the reproduction phase) and the outcome. Taking into account how the concept of path dependence developed over time, it is crucial to establish rigorous criteria for each of those phases.

The sequence of path dependency is opened by the antecedent or initial conditions which are a "base line"<sup>1</sup> of the critical junctures. Antecedent conditions are occurrences, causally linked with critical junctures (but not necessarily with any impact on the further stages of the path), in which critical junctures are rooted.<sup>2</sup> They can be distinguished from other events by establishing their causal connection with respect to critical junctures. However, it is the critical juncture that needs to be identified first and only afterwards its antecedent conditions can be distinguished, as the antecedent conditions on their own cannot be characterized as being predestined to create or result in critical junctures.

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<sup>1</sup> Ruth Berins Collier/David Collier, *Shaping the Political Arena. Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America*, Princeton 1991, p. 30.

<sup>2</sup> James Mahoney, *Path-Dependent Explanations of Regime Change: Central America in Comparative Perspective*, *Studies in Comparative International Development*, Vol. 36, no. 1 /2001, p. 113.

Critical junctures are the moments in time that are triggered by initial conditions. They can be characterized as moments which change the particular trajectory of institutional development or at least when such change of the trajectory is feasible. As it is stated in the literature on the subject, critical junctures "are choice points when a particular option is adopted from among two or more alternatives."<sup>3</sup> They may be described as open windows of opportunity which close after a certain choice is made.

Critical junctures are often characterized as being contingent. Taking into account the fact that these moments in time are rooted in previous events and always set in a particular political situation, it cannot be successfully argued that "contingency" in this situation means "randomness" or "unforeseeability". Instead, "contingency", in relation to critical junctures, should be understood as a state of existence of more than one option, where the choice of a particular option is not predictable (as it does not represent the only imminent, realistic variable) but at the same time it is not random (as the possible choices are related to the political background). Also, the final outcome (the legacy) of the particular choice cannot be foreseen at the moment of the critical juncture, but is nevertheless causally linked to it.

The choices made during the critical juncture may lock-in the path for the development of the institutional pattern, as when the previously recalled window of opportunity closes, the change in the path taken becomes difficult. Therefore, all of the below-mentioned critical phases can also be verified by the use of a counterfactual method, namely by asking if the particular event had not taken place, would the shape of the direct democracy institutions be different. It also needs to be stressed that this research focuses only on the formation of direct democracy institutions and their inclusion in law. For this reason, some historical events which were crucial for the development of the Polish political system may appear insufficiently handled here. It is so only because not all of the crucial political events had an effect on the shape of the institutions of interest.

This study shows that the next stage of institutional development, namely the production phase (preceding the actual reproduction of the institutional pattern) should be paid more attention than it has been given until now by authors who use the path-dependent method. As the critical juncture does not necessarily end with or result in the direct and immediate formation of the institution, but instead only fixes the development path for it, the institutional pattern needs to be created first, in order to be reproduced. The phase of the production of institutional pattern was distinguished in the works of Collier and Collier and Mahoney.<sup>4</sup> Mahoney referred to this phase in a more general manner by including it, together with the reproduction phase in the structural persistence period, as presented in his analysis of the path-dependent explanation.<sup>5</sup>

As this study shows, it may happen that a critical junctures changes the trajectory of the institutional development but not in a direct manner but

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<sup>3</sup> Ibidem, p. 113.

<sup>4</sup> Ruth Berins Collier/David Collier, p. 30 and James Mahoney, *Path-Dependent*, p. 113 and 122-124.

<sup>5</sup> James Mahoney, *Path-Dependent*, p. 113.

rather indirectly, through a sequence of intermediate events, which form a causal, stable, and gradual process. Therefore, the description of the production phase provided by Collier and Collier proves to be more adequate, as they state that "it is useful to distinguish between the mechanisms of the reproduction and the production of the legacy. There often occurs a significant interval between the critical juncture and the period of continuity that is explained by these mechanisms of reproduction."<sup>6</sup> They further point out that "to the extent that the critical juncture is a polarizing event that produces intense political reactions and counterreactions, the crystallization of the legacy does not necessarily occur immediately, but rather may consist of a sequence of intervening steps that respond to these reactions and counterreactions."<sup>7</sup>

At first sight, this description of a production phase may resemble the doctrinal characteristics of the reactive sequence phase, where reactions and counterreactions shape the institutions instead of reproducing the institutional pattern. This is, however, only an apparent impression, as the difference between the production phase and reactive sequence lays in the direction in which the events in the mentioned sequences are aimed. In the case of the reactive sequence, the reactions and counterreactions are causally linked but are simultaneously also aimed against the institutional pattern (as for instance in Mahoney's example of the Democratizing Episodes<sup>8</sup>). In contrast, in case of the production phase, the causally linked events do not arise from the conflicting interests of the political actors but "flow", as it may be described, in the direction set or even forced by the critical juncture.

The production phase is followed by the reproduction phase, which consists of the repetition of the scheme formed during the production phase. This stage may be characterized by the feature of increasing returns (positive feedback).<sup>9</sup> It takes place when the institutional pattern is established and the change in it is not likely to occur. The reasons for such a state may be various as different factors (political, sociological, to some extent legal) play a role in the institutional development. As the research for this paper has shown, the concept of the power of political actors (recalled i.a. by Pierson<sup>10</sup> and Mahoney<sup>11</sup>) seems to be a major factor in reproduction of the institutions of direct democracy, as the institution persists as long as the change is not in the interest (forced or voluntary) of the actors being in power. As Mahoney states, "once the institution develops (...), it is reinforced through predictable power dynamics: the institution initially empowers a certain group at the expense of other groups; the advantaged group uses its additional power to expand the institution further; the expansion of the institution increases the

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<sup>6</sup> Ruth Berins Collier/David Collier, p. 37.

<sup>7</sup> Ibidem, p.37.

<sup>8</sup> James Mahoney, Path-Dependent, p. 113 and 125.

<sup>9</sup> James Mahoney/Daniel Schensul, Historical Context and Path Dependence, in: Robert E. Goodin, Charles Tilly (ed.), The Oxford Handbook of Contextual Political Analysis, Oxford 2006, p. 465.

<sup>10</sup> Paul Pierson, Politics in Time. History, Institutions, and Social Analysis, Princeton 2004, p. 36.

<sup>11</sup> James Mahoney, Path Dependence in Historical Sociology, Theory and Society, Vol. 29, no. 4/2000, p. 521.



power of the advantaged group; and the advantaged group encourages additional institutional expansion."<sup>12</sup> Such a correlation between the actions taken by the advantaged and disadvantaged political actors may be observed when the Government or Parliament are not willing to respond positively to people's will to participate in the decision-making process. Authorities do not want to share their power and therefore the people have no chance to learn how to participate in the decision-making process which subsequently enhances the people's lack of interest in the political life of their country and unwillingness to take civil responsibility. However, such an endurance of the institutional pattern may lead to the next phase, namely reactive sequences, when the previously disadvantaged group becomes strong enough to reach for their proper place in the decision-making process.

In the case of the Central and Eastern European countries, the reproduction phase was often suppressed by the reactive sequence phase, due to the instability of the political system caused by the inner and outside political tensions. As explained above, the reactive sequence phase can be characterized by the chains of reactions and counterreactions, where the actors' resistance to prevailing institutions can be the initial force that launches a reactive sequence.<sup>13</sup> As Mahoney explains, "reactive sequences are often marked by properties of backlash and counterresponse as actors challenge or support institutional patterns established during critical juncture period."<sup>14</sup>

At the end of the development path we can describe, what the outcome or the legacy of the critical juncture is. In the cases in which the reactive sequence appears, the resolution of the conflict created by reactions and counterreactions is the outcome of interest of the whole process. In the instances when the institution develops solely through the means of reproduction, the outcome is manifested as the final shape of the institutions, reinforced by the repetition sequence. Nevertheless, describing the final outcome at the current stage of the institutional development does not mean that the development of the institution stops. Rather, it is only our perspective of the assessment of the institutions that is simply limited by time.

In Poland, the historical changes in the newly formed State often did not allow the path dependent process to fully develop and stabilize. The legacies of critical junctures were of a temporary character. However, even the critical phases that led to a relatively short-lived outcome shaped the subsequent circumstances that eventually resulted in the creation of the direct democracy institutions as we know them today. Not all of these events led to the popularization or broadening of the scope of the use of the above-mentioned institutions. Actually, the first two of them had an adverse effect and in the end stabilized the lack of the institutions and also shaped to some extent people's mentality, making neither the nation nor the Polish authorities used to or eager to rely on this kind of power-sharing. It is only the

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<sup>12</sup> Ibidem, p. 521.

<sup>13</sup> Ibidem, p. 115.

<sup>14</sup> Ibidem, p. 115.

last critical juncture that set the path of the historical development on a track that allowed the legal structure of the direct democracy institutions to evolve to a very modest, burdened with past experiences, level.

## **2 Phase 1: 11 November 1918- 17 March 1921**

This section deals with the first critical juncture observed in the 20<sup>th</sup> century and the development path it established for the direct democracy institutions. It will be shown that the choices made during this particular critical juncture by the political actors responsible for structuring the political system of post-war Poland, led directly, in the short term, to the transformation of the previously established parliamentary system and the subsequent formation of the authoritarian rule, which did not allow for the implementation of any direct democracy institutions.

As part of this critical juncture, it becomes especially apparent how the making of decision at a specific time matters. If the parliamentary system in Poland was established at a time when there were no political tensions in Europe, its transformation or development would probably not have been as severe. Nevertheless, it was formed at a time when the newly-formed Poland was still establishing its position on the post-war map of Europe. As a result, the parliamentary system was doomed to be insufficient for securing the efficient functioning of the state. Even though during this critical juncture the introduction of the direct democracy institutions into the legal system was intensively considered, the subsequent locked-in development of the political system made such an introduction impossible, entrenching the system that did not provide for any citizens' participation in the decision-making process. This outcome was however short-lived as soon afterwards the Second World War broke out.

### **2.1 Critical juncture and its antecedent conditions**

#### **2.1.1 Introduction**

An understandable point in history, to be recognized as a critical juncture, is the moment when Poland regained independence, which is considered to have taken place on 11 November 1918. Naturally, regaining independence was not a sudden occurrence that took place only on that particular day, but this symbolic date was chosen for number of reasons - on this day Germany agreed to the armistice, but also Poles restored their rule over Warsaw after a symbolic disarmament of a German garrison. On that day, the Regency Government also appointed Józef Piłsudski as a Commander of the Polish Forces and subsequently, on 14 November 1918, he was given complete civil power as well. On 16 November 1918, Piłsudski notified all of the countries taking part in the First World War and the neutral countries of

the fact that the Polish State was recreated.<sup>15</sup> The independence of Poland was confirmed in the Versailles Declaration of 3 June 1918 (signed by Great Britain, France and Italy)<sup>16</sup> and finally in the Treaty of Versailles, signed on 28 June 1919 by Germany and the Entente Powers. The Polish territorial situation was however not yet fully stabilized.<sup>17</sup> For instance, Polish borders were still changing until 15 March 1923 when the final resolution of the Conference of Ambassadors of the Principal Allied and Associated Powers (which included the United Kingdom, France, Italy and Japan) was signed.

### **2.1.2 Antecedent conditions**

The fact that Poland would regain independence was to some extent already foreseeable at the end of the First World War. The Triple Entente countries started to express clearly their understanding for the Polish independence movement. Soon after the February Revolution in Russia in 1917, after the Czar was overthrown, the Polish right to independence was already recognized. This right was confirmed after the Bolshevik Revolution (the Great October Socialist Revolution<sup>18</sup>) in November 1917 on a few occasions, mostly in the Declaration on the Rights of the Russian Nations from 15 November 1917.<sup>19</sup> The United States had also acknowledged that right. The speech of Woodrow Wilson given on 8 January 1918 was symbolic in this matter. He stated that an independent Polish State should be formed. This newly-built country should spread over the territories inhabited by the people of undeniably Polish origin, it should have an uninterrupted access to the sea and it should benefit from political and economic autonomy, as well as the territorial integrity. All of these features of the rebuilt state, according to Wilson, should be secured by an international treaty.<sup>20</sup> These events laid the foundations for the critical juncture to begin. They opened a window of new possibilities but had no influence on the choices of the actors deciding on the future of Poland.

### **2.1.3 Critical juncture**

After the First World War, it was crucial to establish the foundations of the new State and its political system. The legal orders that were dictated and in force on the Polish territory during over hundred years of partitions could no longer be accepted. This was not only due to the fact that they differed from

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<sup>15</sup> Marian Kallas, *Historia ustroju Polski*, Warszawa 2005, p. 257.

<sup>16</sup> Wacław Komarnicki, *Ustrój państwowy Polski współczesnej. Geneza i system*, Kraków 2006 (reprint Wilno 1937), p. 19.

<sup>17</sup> Marian Kallas, p. 252-256.

<sup>18</sup> At the time in Russia the Julian calendar was in place, therefore according to that calendar the revolution started in October, even though according to the Gregorian calendar it was already November.

<sup>19</sup> Marian Kallas, p. 252.

<sup>20</sup> *Ibidem*, p. 252.

one another but also because regaining independence called for the establishment of a new legal system. The crucial time when the future Polish system was formed and established and when the decisions concerning the inclusion of the direct democracy mechanisms in the new order were made lasted until the adoption of the so-called March Constitution, which was passed on 17 March 1921. At that particular moment in time, the actors responsible for the newly-formed State faced a broad range of choices, not only in relation to the political system itself, but also with regard to the direct democracy institutions.

To justify the choice of this rather a lengthy critical juncture, it must be stressed that the choice of a new legal rule is not an overnight process. On the contrary, it requires many smaller decisions and events. Right after the First World War, the only certain thing was that Poland would be governed by a democratic system. Throughout this whole period described as a critical juncture, it was uncertain which variation of it would be eventually chosen. Before the War, there was nearly no discussion about the possible shape of the Polish political system, as there was no realistic possibility, that Poland would regain independence.<sup>21</sup> The first preparations and proposals had been made during the war, from 1917 onwards, when it became clear that there would be a place for Poland in post-war Europe. Those ideas and proposals were however prepared when the future of Poland was not yet determined. All of them were based on the doctrine of parliamentary monarchy<sup>22</sup> which meant reaching back directly to the Polish pre-partitions traditions. This direction was completely abandoned after the War.

Right after the war, the work on the actual Constitution proposal was soon postponed due to various matters requiring more urgent parliamentary attention. After all, Poland was lacking even the most basic rules regulating the State bodies on a central level. The legislative process that led to the stabilization of the new legal rule in Poland started by Piłsudski issuing on 14 November 1918 a decree in which he appointed Ignacy Daszyński to form the Government. Daszyński however failed in his mission, due to a strong right-wing opposition, and eventually Jędrzej Moraczewski formed the Temporary Government of the Republic of Poland.<sup>23</sup> On 22 November 1918, Józef Piłsudski enacted the decree on the highest executive power of the Republic of Poland, where he appointed himself as a Provisional Chief of State (*Naczelnik Państwa*), until the first Parliament would begin its work. On 28 November, Piłsudski announced a decree on the electoral system (*ordynacja wyborcza*) and on the same day, based on that decree, Piłsudski issued another one in which he set the date of the parliamentary elections on 26 January 1919.<sup>24</sup> Some authors claim that the establishment of the electoral system and the setting of the date for the free elections were the actions that created the nation as the "corpus electoral".<sup>25</sup> The new Parliament, elected on the basis of a new five-point electoral law, which also granted active and

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<sup>21</sup> Marcin Rachwał, *Instytucje demokracji bezpośredniej w dyskusji sejmowej przed uchwaleniem Konstytucji Marcowej*, *Przegląd Sejmowy* 6(113)/2012, p. 74.

<sup>22</sup> Wacław Komarnicki, *Ustrój państwowy*, p. 30.

<sup>23</sup> Marian Kallas, p. 256.

<sup>24</sup> *Ibidem* and Wacław Komarnicki, *Ustrój państwowy*, p. 24-25.

passive voting rights to women, was summoned in February 1919. Piłsudski resigned from his post, but since the new Parliament had not yet enacted any laws on the new political system, Piłsudski was appointed to continue performing the function of the Chef of State, as provided for by the *Sejm* (the lower chamber of Polish Parliament) resolution of 20 February 1919.<sup>26</sup> This resolution is often referred to as a Small Constitution, as it guaranteed the democratic rule and personal freedoms for the citizens.<sup>27</sup>

All of the above-mentioned laws were of a temporary character. Their role was to stabilize the legal situation in order to create a basis for the new Constitution. The institutions of direct democracy were not mentioned in these laws at all. This does not mean, however, that at that time the institutions of direct democracy were not used. The territorial plebiscites were launched, as they were provided for in the Treaty of Versailles (in Article 88 for the territory of Silesia and in Article 96 for the territory of Warmia and Masuria). The first one took place on 11 July 1920 on the territory of Warmia and Masuria. The second one took place in Silesia on 20 March 1921.<sup>28</sup> Both of those plebiscites had in general a negative result from the Polish perspective. In Warmia and Masuria people voted against joining Poland, mostly because of the overwhelming German terror on that territory.<sup>29</sup> The second plebiscite's results were only partially more favorable towards Poland as, upon the people's decision, the south-east part of Silesia rejoined the Polish territory.<sup>30</sup>

Also, the Constitutional Act containing the Statute of the Silesian Voievodship, enacted by the Polish Parliament on 15 July 1920, in its Article 14 provided for the possibility to introduce a referendum in the autonomous Silesian Voievodship. However, the Parliament of the Silesian Voievodship never passed an act creating a legal framework for the referendum.<sup>31</sup>

These few instances when the institutions of direct democracy were used, turned out to be, from the time perspective, rather random than structural. Not only had the citizens of Poland no experience in the participation in the decision-making process (due to the years of foreign oppression and also lack of popular voting rights) but also the majority of the political representatives did not consider the direct democracy institutions to be promising in respect of the efficient decision-making process, which would soon be confirmed by the results of the upcoming parliamentary debate.

Once all of the temporary laws regulating the most urgent matters were enacted, the Polish Parliament, on 8 July 1920, engaged in the work on the

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<sup>25</sup> Paweł Sarnecki, *Zasady ustrojowe odradzającej się Rzeczypospolitej*, *Przegląd Sejmowy*, Vol. 5 (28)/1998, p. 33.

<sup>26</sup> Marian Kallas, p. 259 and Waław Komarnicki, *Ustrój państwowy*, p. 24 - 25.

<sup>27</sup> Waław Komarnicki, *Ustrój państwowy*, p. 10 and 26.

<sup>28</sup> Andrzej Kulig, Bogumił Nalezinski, *Referendum w systemie ustrojowym Polski*, *Przegląd Sejmowy*, Vol. 5 (17)/1996, p. 26.

<sup>29</sup> Waław Komarnicki, *Ustrój państwowy*, p. 21.

<sup>30</sup> *Ibidem*, p. 21-22.

<sup>31</sup> Dz.U. 1920 Nr 73, poz. 497 oraz Marcin Rachwał, *Instytucje*, p.86.

Constitution.<sup>32</sup> The creators of the March Constitution did not make any significant use of the Polish constitutional traditions, despite the ideas presented in the first proposals written in 1917, which were based on the doctrine of parliamentary monarchy. They intended to create a legal system that would resemble and match the Constitutions of the Western European countries. However, Poland and its society at that time were lacking the coherent basis for such a complex legal order.<sup>33</sup> Although the Polish Constitution of 3 May 1791 was the second Constitution adopted in the World and the first one in Europe, it has never been enforced due to the partition of Poland. The 18<sup>th</sup> century ideas of democracy, popular sovereignty, the rule of law and freedom of individual inspired of course the creation of the new system (the 3 May Constitution was actually even mentioned in the preamble to the March Constitution of 1921<sup>34</sup>). They fully responded to the Polish Nation's needs at that particular time. However, the full reception of the 18<sup>th</sup> century legal framework was not possible and the creators of the new order thus tried to adapt foreign democracy models to the Polish conditions. While the new Polish system was inspired by other European forms of Government, it cannot be assumed that it was blankly copied. One must bear in mind that Poland had existed since the 10<sup>th</sup> century and therefore constituted a political and cultural unity. In fact, the over hundred years of partition of Poland did not extinguish its own identity.<sup>35</sup> Nevertheless, those general rules had to be filled with more precise content and for this purpose the authors of the March Constitution were inspired by the system of the Third French Republic.<sup>36</sup>

The discussions and proposals preceding the adoption of the March Constitution were very fruitful, i.a. in relation to the direct democracy mechanisms. The available protocols of the *Sejm* debates allow us to state that many of the political parties strongly supported the idea of including the direct democracy institutions in the new legal order. The proposals for the Constitution often included complex provisions not only on referendums but also on popular veto and on popular initiative.<sup>37</sup>

Among the various Constitution proposals, four are especially worth mentioning because of their attempt to introduce the institutions of direct democracy. The first one was prepared by Mieczysław Niedziałkowski and submitted on behalf of the Polish Socialist Party. It was based on the idea of the sovereignty of the people. The proposed political system was a parliamentary republic with a broad inclusion of the direct democracy institutions. It suggested the introduction of referendum, popular veto (a *post legem* facultative referendum called against an act of law passed by the

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<sup>32</sup> Wacław Komarnicki, *Ustrój państwowy*, p. 32.

<sup>33</sup> Wacław Komarnicki, *O ustroju państwa i konstytucji*, ed. Stanisław Kilian, Warszawa 2000, p. 51-52.

<sup>34</sup> Michał Pietrzak, *Konstytucja z 17 marca 1921 r. z perspektywy 80 lat*, *Przegląd Sejmowy* 2(43)/2001, s. 9.

<sup>35</sup> Wacław Komarnicki, *Ustrój państwowy*, p. 11.

<sup>36</sup> Michał Pietrzak, p. 13, Paweł Sarnecki, *Konstytucja Marcowa a rozwój konstytucjonalizmu polskiego*, *Przegląd Sejmowy* 2(43)/2001, s. 38, Mirosław Granat, *Konstytucja RP na tle rozwoju i osiągnięć konstytucjonalizmu polskiego*, *Przegląd Sejmowy* 4(81)/2007, s. 12 and Wacław Komarnicki, *O ustroju państwa*, p. 67.

<sup>37</sup> Marcin Rachwał, *Instytucje*, s. 75-76.



Parliament), popular initiative (for which validity not less than 100 000 signatures would have to be collected) and even a popular motion for the dissolution of the *Sejm*, requiring 500 000 signatures, which would be filed with the President.<sup>38</sup> The Socialists wanted the whole population to participate and to contribute to managing State affairs. They were convinced that introducing direct democracy could help educating and integrating the Nation and, most importantly, creating the notion of responsibility for the future of Poland.<sup>39</sup> It would also create an obstacle to a possible abuse of power by the Parliament.<sup>40</sup> The proposal for introducing the institutions of direct democracy, especially the popular initiative, was inspired by their existence and broad use in the Swiss Confederation.

The Constitution draft prepared by Włodzimierz Wakar and submitted on behalf of the left-wing political party PSL "Wyzwolenie" (Polish People's Party "Wyzwolenie") also included the direct democracy mechanisms. The referendum was foreseen on the local, community level. It would have to take place to confirm all of the major decisions taken by the community Parliaments.<sup>41</sup> On the national level, according to the proposal, each citizen would be entitled to submit a popular initiative, to address the *Sejm* with the remarks or comments about the draft laws that were considered by the Parliament and also to address the Government, through the *Sejm*, with requests for explanations concerning the Government policy.<sup>42</sup> Further, if 500 000 signatures were collected, an act of law enacted by the Parliament would have to be either again voted upon by the *Sejm* or submitted to a national referendum. A nation-wide referendum would also be obligatory in the matters of particular importance.<sup>43</sup> Additionally, the first draft included the empowerment of 1 000 000 citizens to request the dissolution of the Parliament or the removal of the Head of the State from his post. These provisions were however removed from the Party's final draft, which was submitted in the proceedings of the Parliament.<sup>44</sup>

Direct democracy institutions were also provided for in the Constitution draft formulated by the Deputy Józef Buzek. This proposal was based on the US political system and provided for the institutions of referendum and popular initiative which could be applied only in relation to the Constitutions enacted at the community level and the national level. It was particularly interesting that the use of the direct democracy institutions was limited to the communities where at least 90% of all population was literate, as Józef Buzek

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<sup>38</sup> Marcin Rachwał, *Demokracja bezpośrednia w procesie kształtowania się społeczeństwa obywatelskiego w Polsce*, Warszawa 2010, p. 103-104 and Anna Rytel-Warzocho, *Referendum ogólnokrajowe w państwach Europy Środkowo-Wschodniej*, Warszawa 2011, p. 95.

<sup>39</sup> Marcin Rachwał, *Instytucje*, p. 75.

<sup>40</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 104.

<sup>41</sup> Marcin Rachwał, *Instytucje*, p. 81.

<sup>42</sup> *Ibidem* and Marcin Rachwał, *Demokracja bezpośrednia*, p. 105.

<sup>43</sup> *Ibidem*, p. 105.

<sup>44</sup> Marcin Rachwał, *Instytucje*, p. 82

was convinced that participation in the direct democracy process required at least some political knowledge and education.<sup>45</sup>

The last Constitution draft which included the institutions of direct democracy was prepared by the Deputy Władysław Wróblewski. Although this proposal was based on the system of the Third French Republic (which did not foresee the direct democracy mechanisms), it also provided for the legislative popular initiative which could be submitted by 300 000 citizens, and for the referendum which would be used to decide on a passing of a law or a Constitution in exceptional situations, when the two chambers of Parliament would not be able to reach consensus. In case of the amendments to the Constitution, a referendum could be proposed by 300 000 people, but in the case of an act of law, only one of the disagreeing chambers of Parliament had a right to request the referendum.<sup>46</sup>

None of these drafts were accepted by the Constitutional Commission, which decided to prepare its own proposal. That draft, however, did not include any traces of direct democracy institutions.<sup>47</sup> The Deputies from the right-wing parties were strongly opposed to the introduction of direct democracy mechanisms into the Commission's draft, stating that Poland would become an arena of constant voting, which would not allow any legislative decisions to be made. The example of Switzerland was recalled, where, according to the Deputies, people made random, unnecessary decisions, but most of all were weary of this kind of democracy (which was reflected by low voter's participation).<sup>48</sup>

During the legislative procedure in the *Sejm*, which began on 8 July 1920, the supporters of direct democracy created a unified opposition against other Constitution drafts that did not mention these institutions in any form. As the new Constitution would provide that the people of Poland were the sovereign, they stressed that this declaration should be followed up with concrete legal measures which would allow citizens to effectively participate in the decision-making process. The people's participation in the power-sharing should be real, expressed, among others, in the form of popular initiative. The opponents, however, responded that the popular initiative was not a democratic, but demagogic and populist tool.<sup>49</sup> These views were actually shared by the constitutional law scholars. For instance, Adhemar Esmein, a French Professor of constitutional law, published and acclaimed in Poland, was convinced that people do not have either the knowledge nor the time to study legislative drafts to later make a conscious decision on their enactment in the referendum.<sup>50</sup> They would either accept the new legislation without understanding it or reject it because of a small detail or due to a misunderstanding. He also criticized the advisory referendums, claiming that

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<sup>45</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 104 - 105 and Anna Rytel-Warzocho, *Referendum ogólnokrajowe*, p. 94.

<sup>46</sup> Marcin Rachwał, *Instytucje*, p. 80-81 and Anna Rytel-Warzocho, *Referendum ogólnokrajowe*, p. 94-95.

<sup>47</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 106.

<sup>48</sup> Marcin Rachwał, *Instytucje*, p. 83.

<sup>49</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 107-108.

<sup>50</sup> Adhemar Esmein, *Prawo Konstytucyjne*, Warszawa 2013 (reprint Warszawa 1921), p. 314-316.



they release the legislative bodies from the responsibility for the acts of law, which created bad practice.<sup>51</sup> Those opinions were also shared by Wacław Komarnicki and by the Polish Professor Zygmunt Cybichowski, who, by recalling the Swiss experience, claimed that people could reject the best reforms and that they often took position, through popular votes, on issues which they did not understand.<sup>52</sup>

Eventually, during the votes on individual provisions, all of those providing for the institutions of direct democracy were rejected by the majority of Deputies.<sup>53</sup> The March Constitution therefore established a parliamentary democratic system with no direct democracy institutions. This result of the parliamentary process can be characterized by a certain level of contingency, as the various drafts proposing the introduction of the institutions of direct democracy were seriously considered in the Parliament. Up to the very end of the legislative proceedings, it was not certain which option (the one providing for the institutions of direct democracy or the one omitting them) would prevail. In the end, the establishment of an insufficient, for that moment in time, political system, soon extorted the transformation of the system and in fact led directly to the formation of an authoritarian rule in Poland.

## 2.2 Path-dependent process

### 2.2.1 Production phase

The *status quo* characterized by the lack of the institutions of direct democracy was soon entrenched by the events that followed the enactment of the March Constitution, which made it difficult to realistically imagine a new attempt to introduce direct democracy. The new parliamentary system established by the March Constitution of 1921 did not last long. Soon, the political processes weakening the parliamentary rule, enhanced by the deficiencies of the parliamentary system, started to prevail and eventually resulted in the military Coup on the 12-15 May 1926, led by Józef Piłsudski (the so-called "the May Coup"). It needs to be stressed that this military coup was supported by the majority of the Polish citizens.<sup>54</sup>

The slow strengthening of the presidential power had begun however a couple years before. The legal construction of the *Sejm* provided for in the

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<sup>51</sup> Ibidem, p. 314-316.

<sup>52</sup> Marcin Rachwał, *Instytucje*, p. 84, citing Zygmunt Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny o państwie i porównawczego prawa państwowego*, vol. II, Warszawa 1927, p. 61 and Anna Rytel-Warzocho, *Referendum ogólnokrajowe*, p. 96, citing Mariusz Jablonski, *Referendum ogólnokrajowe w polskim prawie konstytucyjnym*, Wrocław 2001, p. 22.

<sup>53</sup> Marcin Rachwał, *Instytucje*, p. 85.

<sup>54</sup> Marian Kallas, p. 259.

Constitution of 1921 was criticized nearly from the outset. The lower chamber of the Polish Parliament had very strong competences, which led to the *Sejm's* "absolutism" (mostly due to the weak competences of the President and the Government, the lack of the possibility to dissolve the Parliament as well as the lack of the Constitutional Tribunal entitled to review the laws). This created a practical abdication of the Executive from performing even those weak competences which it was empowered to perform. Such a situation was particularly dangerous, when we bear in mind the fact, that the described system was introduced in Poland at a time when there was no qualified administration staff and when the Polish Deputies were not experienced in ruling the country.<sup>55</sup> The Prime Minister Władysław Grabski proposed that the *Sejm* should give the President special authorization (*pełnomocnictwo*) which would allow him to enact decrees with the binding force of law. The President was equipped with such an authorization from 1924 onwards, but eventually could not use it to carry out substantial economic or political reforms.<sup>56</sup>

In 1926, the need for a significant state system reform became obvious. Not only the Polish economy needed reforms, but also a strengthening of the State through a constitutional reform was necessary because of the Government crisis and the international political tensions which were again a threat to the independence of Poland. Some authors even claimed that the reform may save the Polish Nation from shrinking and eventually disappearing.<sup>57</sup> In such circumstances, Józef Piłsudski, who had never been a supporter of the form of the system created in the March Constitution of 1921, reached for power. Such a decision was not only the result of the situation in Poland, but mostly also of the events in other European countries, where from 1922 onwards authoritarian regimes had started to prevail (in Italy in 1922, in Spain in 1925, in Lithuania and Portugal in 1926, in Germany in 1933<sup>58</sup>).

Subsequently, the new Government, with Prof. Kazimierz Bartel as a new Prime Minister, proposed on 17 June 1926 a draft law significantly amending the March Constitution. The Government intended to change the relation and distribution of power between the legislature and the executive.<sup>59</sup> The authoritarian rule was confirmed in the so-called August Constitution Amendment enacted on 2 August 1926. The Executive was strengthened by the President being given the right of dissolution of the Parliament and the right of issuing decrees which had the legal force of parliamentary acts of law. He could exercise the latter entitlement between the Parliament's terms of office. The President was also given a much broader right of issuing decrees based on an authorization provided for by an act of law.<sup>60</sup>

The on-growing conflict between the Legislature and the Executive still required a profound revision of the March Constitution. The deliberations on a

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<sup>55</sup>     Wacław Komarnicki, O ustroju państwa, p. 69, Wacław Komarnicki, Ustrój państwowy, p. 61-63 and Michał Pierzak, p. 12.

<sup>56</sup>     Wacław Komarnicki, O ustroju państwa, p. 43-44, 59 and 68 and Wacław Komarnicki, Ustrój państwowy, p. 82-84.

<sup>57</sup>     Wacław Komarnicki, O ustroju państwa, p. 45.

<sup>58</sup>     Wacław Komarnicki, Ustrój państwowy, p. 7-8.

<sup>59</sup>     Ibidem. p. 67-68.

<sup>60</sup>     Ibidem, p. 74-75.

new Constitution began on 31 October 1928 when a parliamentary club - the Non-partisan Bloc for Cooperation with the Government (*Bezpartyjny Blok Współpracy z Rządem*) - filed a resolution, requesting that the *Sejm* begin the procedure on the revision of the March Constitution.<sup>61</sup> Within these debates the left-wing parties tried again to introduce the institution of popular initiative, but at that time there was even less consensus for it than during the preparation of the March Constitution. In 1929, the Socialists, PSL "Wyzwolenie" and the Peasant Party (*Stronnictwo Chłopskie*) submitted together an amendment to the March Constitution which provided for the institution of popular initiative (requiring 100 000 signatures for its successful submission).<sup>62</sup> The educational role of the popular initiative was again stressed, but this time Mieczysław Niedziałkowski resigned from trying to introduce a referendum, alongside an initiative. The mentioned parties, when discussing the draft amending the Constitution, considered including the referendum as well, but after all decided against it.<sup>63</sup> Niedziałkowski changed his opinion on the institutions of direct democracy because he had noticed the disadvantages of the people's direct participation in the decision-making process. He started claiming that the referendum, especially the obligatory one, was an obstacle to change and reform, as people tended to vote in favor of maintaining a *status quo* rather than for proposed amendments. Additionally, if the technical difficulties in launching a referendum on a (bigger than Swiss) Polish territory were taken into account, the general evaluation of that institution must have been negative.<sup>64</sup> His change of mind can also be explained by the experience of the territorial plebiscites, which in general were regarded as a failure.<sup>65</sup>

This only shows that Poland was already on a track that made the inclusion of the citizens in the decision-making process impossible. At this point, after the inevitable transformation of the "absolute" parliamentary system into an authoritarian one, the institutional pattern that was established, did not support the idea of any kind of the direct democracy institutions. In this instance, it may be observed how the production of the pattern evolved. After the starting point (the enactment of the March Constitution of 1921), the political system was established in a manner that could not sufficiently respond to the unstable political situation in Europe and hence had to be transformed into a stronger and more adequate rule for that time. This did not happen through a series of reactions and counterreactions which would consist of the political actors acting against the regime (as will be observed in case of the critical juncture of 1943), but instead the political system was adjusted to the needs of the country in a non-revolutionary manner.

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<sup>61</sup> Paweł Sarnecki, *Konstytucja Marcowa*, p. 24.

<sup>62</sup> Marcin Rachwał, *Instytucje*, p. 86.

<sup>63</sup> Anna Rytel-Warzocha, *Referendum ogólnokrajowe*, p. 96.

<sup>64</sup> Marcin Rachwał, *Instytucje*, p. 86 and Anna Rytel-Warzocha, *Referendum ogólnokrajowe*, p. 96.

<sup>65</sup> Anna Rytel-Warzocha, *Referendum ogólnokrajowe*, p. 96.

### **2.2.2 Reproduction phase**

The April Constitution of 1935 was a final confirmation of the new authoritarian system. It made it impossible to even consider the introduction of direct democracy institutions. The decisions made during the first years of the existence of the Second Republic of Poland (mostly concerning the structure of the Parliament that had "absolute" power, and the competences of the Executive which were very limited), together with the political tensions in Europe at the time, created the need for a strong leadership. The political system created by the March Constitution was not well adapted to this situation due to the lack of maturity of the Polish Deputies and to the political situation in Europe.

The phase that came after the enactment of the April Constitution should be considered as a reproductive one. At that time, the reformed system, without the direct democracy mechanisms, could better suit the needs of the country and potentially secure its safety and existence. Time proved, however, that this phase was extremely short lived. The reproduction of the institutional pattern which did not provide for the direct democracy mechanisms was quickly interrupted. Soon, the outbreak of the Second World War forced new, unwelcomed changes into the Polish system.

## **2.3 Outcome**

The importance of this crucial phase for the shaping of the direct democratic institutions in 20<sup>th</sup> century Poland may not be obvious at first instance. After all, this period did not lead to the introduction of the direct democracy mechanisms and, what is more, the political system introduced turned out to be an authoritarian one. However, it is crucial to notice how popular these ideas were at first, after the First World War, among the left-wing parties. This should not be without significance when we try to establish the origins of these institutions in today's Poland. Besides, the introduction of the institutions of direct democracy was carefully analyzed on the parliamentary forum during the critical juncture phase. Unfortunately, the French model used and the recalled Swiss experience (which was in the view of Polish politicians mostly negative) during the deliberations on the March Constitution, set a pattern that excluded the possibility of using direct democracy mechanisms in Poland.<sup>66</sup>

In this particular case, it is especially useful to rely on a counterfactual argument. It is fair to state that if the choices made in 1921 were different, even if they were only temporary due to the subsequent historical events (such as the establishment of the authoritarian rule in Poland in 1926 and the Second World War with all its consequences), the direct democratic institutions could have already been rooted in the perception of the whole Nation, as was the March Constitution of 1921. If direct democracy mechanisms were introduced at that time in some form, even a limited one,

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<sup>66</sup> Anna Rytel-Warzocha, *Referendum ogólnokrajowe*, p. 96.

then the later enactment of a referendum law in 1987 would not appear to be such a significant legislative achievement (taking into account how difficult it was to reach the *quorum* necessary for the referendum result to be binding).<sup>67</sup> Such a hypothesis appears to be justified, as the provisions of the Constitution of 1921 had been recalled during the debates on the Constitution of 1997.<sup>68</sup> Therefore, the results of the choices made nearly hundred years ago still have consequences today.

### **3 Phase 2: 28 November - 1 December 1943**

This section covers the second critical juncture and the subsequent phases of the institutional legal development. The definite inclusion of Poland under the Soviet sphere of influence in 1943, did not only hinder the development of the direct democracy mechanisms (which already was the case with regard to the development path set by the previous critical juncture), but it also deepened the division between the citizens and the authorities. The USSR introduced a totalitarian regime, in which the so-called "democratic" institutions were only a caricature of democracy. The imposed system was not created for the people, but rather against them.

This system *de facto* suppressed the freedoms of citizens and it did not offer economic wellbeing and stability. Therefore, soon after it was established, the citizens started to express their deep discontent and resistance. During this period, the authorities started to gradually lose their power through a series of events (which can be described as reactions and counterreactions aimed against the established institutional path). To some extent, they became more lenient and willing to comply with people's requests. Eventually, the conflict between the citizens and the authorities created the next critical juncture that placed the institutional pattern back on the "democratic" trajectory.

#### **3.1 Critical junctures and its antecedent conditions**

##### **3.1.1 Introduction**

The second crucial moment in the history of direct democracy institutions came in 1943, when it was decided that after the end of the Second World War, Poland would find itself within the Soviet sphere of influence. This was the moment when the choices of the European leaders, made against the will of the Polish Government in London and the Polish Underground State (*Polskie Państwo Podziemne*, the resistance organizations acting in Poland, in cooperation with the Polish authorities based in London) in Poland, determined the course of the years to come and dramatically reshaped the Polish system, which did not even have a chance to fully stabilize after the

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<sup>67</sup> The Law on popular consultations and referendum of 1987 is discussed on p. 28-33.

<sup>68</sup> Michał Pierzak, p. 18.

enactment of the April Constitution. At this time, the previous institutional pattern (even though disturbed temporally by the Second World War) was unambiguously broken.

### **3.1.2 Antecedent conditions**

After the outbreak of the Second World War, when Poland was attacked from both sides by Germany and the USSR, the development of a state system of a recently rebuilt country was interrupted. Both occupants entered into an agreement, on 28 September 1939, dividing Poland between themselves and introducing, by illegal means, their own administration on the occupied territories.<sup>69</sup> The official Polish authorities moved to London and the Polish Underground State took all measures to save Polish independence. Those initial conditions allowed for the new critical juncture to form, this time undoubtedly with detriment to Poland.

### **3.1.3 Critical juncture**

Although Germany lost in the Second World War, Poland's situation was still extremely difficult. The Soviet Union severed the diplomatic relations with Poland on 25 April 1943 and did not want the independent Poland to be restored after the War. The other Allies agreed to the USSR terms during the Conference in Teheran, which took place from 28 November until 1 December 1943.<sup>70</sup> The US President Franklin Roosevelt and the British Prime Minister Winston Churchill accepted the plan that the Polish territory would be kept under the Soviet rule.

This agreement, confirmed later during the Conferences in Yalta (February 1945) and Potsdam (July-August 1945), settled Poland's fate as it was clear that Poland, deprived of its allies, would not be able to fight for its independence. The leaders of the Polish Underground State still tried to negotiate with the Soviets their participation in the new Government but they were arrested and tried in Moscow. On 28 June 1945, a Communist Government was established with Edward Osóbka-Morawski as a Prime Minister. The international community recognized this Government as an official Polish executive and withdrew its recognition for the Government established for the time of the War in London.<sup>71</sup>

The choices made during the Teheran Conference placed Poland within the Soviet sphere of influence which had a bearing on the shape of the new system that was to be formed on the Polish territory. This point in Polish history should be considered as a critical juncture for it changed the trajectory of Poland's evolution as a State. The choices of the actors, at that time more the leaders of the USA, the UK and the USSR, than Polish leaders,

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<sup>69</sup> Marian Kallas, p. 262-263.

<sup>70</sup> Marian Kallas, p. 266.

<sup>71</sup> Ibidem, p. 266-267.



determined the change and formation of the political system in Poland. The choices made during the Teheran Conference can be characterized as contingent. They were of course rooted in the circumstances of the time and could be described as a compromise reached by the most powerful European leaders, but they were definitely neither obvious nor evident. The Polish leaders especially did not expect such a result. Naturally, the USSR did not conceal even earlier its intention to gain control over Poland. However, the Polish State was still counting on the Western Allies help.

## **3.2 Path-dependent process**

### **3.2.1 Production phase**

The Polish Workers' Party (*Polska Partia Robotnicza*), affiliated with the USSR, began as early as in March 1943 the first preparations for establishing a new rule in Poland.<sup>72</sup> In November 1943, the Party rejected the Constitution of 1935, claiming that it was of a fascist character, and by this action also clearly stated that the Polish Government in London should not be recognized.<sup>73</sup> The Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego*, the first Polish temporary Government established and controlled under Joseph Stalin's supervision) announced that the only Polish Constitution that could be recognized until a new Parliament was elected was the March Constitution of 1921.<sup>74</sup>

After the Teheran Conference, the Soviet claims to include Poland in their influence sphere were accepted by the US and the UK and therefore the Communists began imposing their rule in Poland.<sup>75</sup> The parliamentary elections only took place on 19 January 1947 (at the Yalta Conference the Communist Government of Poland was obliged to launch free parliamentary elections). The only parties allowed to passively participate were those recognized by the Communist regime. The results were forged because the Government feared being defeated.<sup>76</sup>

However, before the new Parliament was elected, the Communist Government, seeking support (even if it was to be only fictional), wanted the people to decide on the shape of the future regime. For this purpose, the institution of direct democracy, namely the referendum, was used by the State in this one instance, on 30 June 1946. It was proposed by the Polish Socialist Party in cooperation with the Polish Workers' Party<sup>77</sup> and launched in

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<sup>72</sup> Paweł Borecki, *Geneza Konstytucji PRL z 22 lipca 1952 r.*, *Przegląd Sejmowy*, Vol. 5 (82)/2007, p. 75.

<sup>73</sup> *Ibidem*, p. 76.

<sup>74</sup> *Ibidem*, p. 76.

<sup>75</sup> Marian Kallas, p. 266.

<sup>76</sup> *Ibidem*, p. 273.

<sup>77</sup> The two parties joined together in 1948 and created the Polish United Workers' Party (*Polska Zjednoczona Partia Robotnicza*, PZPR).

a fashion typical for the Communist regime, namely to gain the legitimization from the citizens and their support for the left-wing parties. The other practical reason behind this referendum was that the Polish Workers' Party wanted to postpone the parliamentary elections and test peoples' voting preferences.<sup>78</sup>

The referendum was based on the laws enacted only for this particular purpose.<sup>79</sup> The State National Council (*Krajowa Rada Narodowa*, KRN, a body acting as the parliament, formed at the end of the Second World War and controlled by the Soviet Union) enacted two laws regulating this particular referendum. The first one, passed on 27 April 1946, on popular vote,<sup>80</sup> stated in its preamble that before the parliamentary elections, a referendum was to be launched, to let the people decide on the rules governing the future Constitution and on the socio-economic and political transformations resulting from defeating the Nazi invader. It set the date of the referendum on 30 June 1946 and formulated three referendum questions. The second law, on the popular vote procedure, was enacted on 28 April 1946.<sup>81</sup> This law provided for a detailed regulation of the voting rights, constituencies, referendum commissions, referendum campaign and voting rules. To increase the chances for a successful referendum, Article 32(3) of the law on the popular vote procedure provided that voting cards that were not filled out by the voters (but placed in the ballot box) were to be considered valid and containing positive answers to all three questions. There were no requirements for the *quorum*. Besides these two laws enacted for the purpose of this particular referendum, there was no law at the time that provided in general for the institutions of direct democracy.

As mentioned earlier, the referendum was of a pre-constitutional character. The people were supposed to decide on the shape of the constitution that was to be created. The voters were asked three questions: (1) if they wanted the liquidation of the *Senat* (the upper house of Parliament); (2) if they opted for the strengthening of the economic system introduced by the agricultural reform in the future Constitution and the nationalization of the main economic branches, with the preservation of the legally protected private initiative, (3) and if they wanted to keep the western borders of Poland on the natural border of the Baltic Sea and Odra and Nysa Lużycka<sup>82</sup> rivers. According to the official results, 85,3% of the citizens entitled to take part in the voting participated. The results of the vote were positive for all of the questions: 68% of the voters said "yes" to the first question; 77,1% to the second; and 91,4% to the third.<sup>83</sup> Officially the left-wing parties gained support. The results were, however, fabricated which later was even admitted

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<sup>78</sup> Andrzej Paczkowski, Referendum z 30 czerwca 1946 r. Próba wstępnego bilansu, in: Danuta Waniek, Michał T. Staszewski (ed.), Referendum w Polsce współczesnej, Warszawa 1995, p. 70 and 76.

<sup>79</sup> Marcin Rachwał, Demokracja bezpośrednia, p. 110, Marian Kallas, p. 270 and Henry E. Brady/Cynthia S. Kaplan, Eastern Europe and the Former Soviet Union, in: David Butler/Austin Ranney (ed.), Referendums around the World, Basingstoke 1994, p. 182.

<sup>80</sup> Dz.U.1946.15.104.

<sup>81</sup> Dz.U.1946.15.105.

<sup>82</sup> Marcin Rachwał, Demokracja bezpośrednia, p. 110.

<sup>83</sup> Marian Kallas, p. 271.



by some of the communist leaders.<sup>84</sup> According to recent scholarship, the public response was positive only with regard to the third question.<sup>85</sup> Some commentators claim that the results were fabricated with regard to all of the questions.<sup>86</sup>

Therefore, this outcome must have had a significant meaning for the Communist party as it showed that the people could not be trusted to vote according to the regime's will. Not only did it test the voters' preferences, but also it taught the authorities what they should be prepared for when launching a public vote. The Communists learned from this experience and soon afterwards summarized the reasons for the real negative outcome of the referendum. During one of the Communist party meetings, right before the parliamentary elections, it was stressed that during the referendum campaign the agents' network in the country was not sufficiently focused on the referendum, not all members of the voting committees were correctly verified, the preventive arrests were not correctly performed and the Volunteer Reserve Militia (*Ochotnicza Rezerwa Milicji Obywatelskiej*, ORMO, paramilitary organization created in 1946 under control of the Ministry of Public Security) was not involved.<sup>87</sup> Facing such a declaration, the Communists' intentions with regard to launching the referendum appear to be obvious.

Although the Communists already used the institution of a referendum and effortlessly managed to fabricate the results and to keep that fact officially secret until 1989,<sup>88</sup> none of the Constitution drafts prepared at that time provided for that instrument.<sup>89</sup> The institutions of direct democracy were not introduced in the Small Constitution enacted in 1947 which regulated the functions and the term of the *Sejm*. This law also stated that one of the tasks of the newly-elected *Sejm* was the enactment of the new Constitution.<sup>90</sup> This new Constitution would not have to be approved in a popular vote.

Finally, the *Sejm* began the work on the new Constitution, which lasted from 1951 to 1952. The final version of the Constitution draft was broadly consulted with the people. In the so-called national discussion, eleven million citizens took part in 200 000 meetings.<sup>91</sup> It was nevertheless clear from the beginning that this Constitution would not bring any changes to the already introduced regime. As it is commonly known, the process of preparing the draft was not even conducted in a public, open way. The procedures followed in the *Sejm* were of a fictional character. Instead, the decisions concerning the shape of the new Constitution were often made in small groups of people (instead of the Parliament) involving the leaders of the Communist regime

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<sup>84</sup> Henry E. Brady/Cynthia S. Kaplan, p. 182 and Andrzej Paczkowski, p. 74-75.

<sup>85</sup> Marian Kallas, p. 271 and Pawel Borecki, p. 78.

<sup>86</sup> Andrzej Paczkowski, p. 76.

<sup>87</sup> Ibidem.

<sup>88</sup> In the literature published before 1989 the referendum results are always quoted according to the official authorities' statement, after: Andrzej Paczkowski, p. 74.

<sup>89</sup> Andrzej Paczkowski, p. 67.

<sup>90</sup> Pawel Borecki, p. 77.

<sup>91</sup> Ibidem, s. 84.

and in cooperation with the USSR.<sup>92</sup> The final outcome of these work was the Constitution enacted on 22 July 1952. This Constitution was in fact an adaptation of the USSR Constitution regime to the Polish realities. The Polish names of the main State bodies were kept (such as the *Sejm* or the Council of Ministers) but the content of the new Constitution did not reflect any of the concepts from the Constitutions of 1921 or 1935. The institutions of direct democracy were not introduced into the system despite the fact that a referendum had already been used in 1946. Such an option was not consider as the totalitarian system did not provide for any citizens' participation in the decision-making process. The established institutional pattern was in fact entirely of an anti-democratic character.

### **3.2.2 Reproduction phase**

With respect to the sequence of events initiated by the critical juncture of 1943, the reproduction phase during which the system entrenched by the Constitution of 1952 would only reinforce itself, lasted only for a very short time, until 1956. The system introduced created a state similar to the occupation of the Polish territory and for this reason was completely alien to citizens. Almost right after the end of the production phase, the beginning of the reactive sequences can be observed (marked by citizens' strong opposition to the established pattern and the authorities reactions to people's protests) which basically routed the self-reproducing phase.

The institutional pattern, created after the USSR placed Poland within the Soviet sphere of influence, did not foresee the institutions of direct democracy as we understand them today. However, it is interesting to note that the Soviet doctrine also referred to direct democracy but in its caricatural sense. To underline the fact that the Communist power arose from the will of the working class, the forms of direct democracy gained a new, much broader sense.<sup>93</sup> This was typical for the Socialist regimes, where many other institutions were considered to fulfill the role of the direct democracy, namely, popular consultations, motions and petitions, the existence of political parties, organizations or formalized public discussions and even the elections of representatives.<sup>94</sup>

As a result of this approach, in 1976 a procedure on popular consultations was even introduced on a constitutional level.<sup>95</sup> This institution of non-binding discussions with the people was considered to be sufficient to involve the citizens in the decision-making process. However, it needs to be stressed is that the results of those consultations were not binding for the authorities. Since the authorities did not face any political responsibility, they were not even politically forced to respond to people's views. What is more, the results of the consultations were not even easy to summarize as the citizens merely stated their opinions and did not choose between given options.

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<sup>92</sup> Pawel Borecki, p. 75.

<sup>93</sup> Anna Rytel-Warzocha, Referendum ogólnokrajowe, p. 100-101.

<sup>94</sup> Ibidem and Andrzej Pułło, W sprawie pojęcia demokracji bezpośredniej w państwie socjalistycznym, Państwo i Prawo, 12 (490)/1986, p. 26 and 31.

<sup>95</sup> Jerzy Jaskiernia, Ustawowa regulacja konsultacji społecznych i referendum, Państwo i prawo Vol. 7 (497)/1987, p. 7.

### 3.2.3 Reactive sequences phase

Soon after the enactment of the Constitution of the People's Republic of Poland, the economic situation led to protests and political unrest. On 28 June 1956, the workers from Cegielski's factory in Poznań began to strike and they were brutally suppressed by the army.<sup>96</sup> The situation in the country was very tense. On 8 March 1968, students began protesting after a symbolic ban on the theater performance of the patriotic "*Dziady*" by Adam Mickiewicz, directed by Kazimierz Dejmek in the National Theater in Warsaw. While these protests were again suppressed by the regime, they influenced the growth of the opposition.<sup>97</sup> Soon, on 12 December 1970, a new strike burst out, as a response to a significant increase of prices. Strikes began in the Shipyard in Gdańsk and soon other cities including Szczecin and Gdynia joined in. People requested the creation of free trade unions. The authorities responded by using armed forces against the demonstrators. On 24 June 1976, after another increase in prices was announced, the workers in Radom, Płock and Ursus started demonstrating. This time the suppression of protesters was not as brutal, but it led to political repressions against many of them (including the dismissals from work). In response, the opposition established the Workers' Defence Committee (*Komitet Obrony Robotników*, KOR), later renamed to "Committee for Social Self-defence KOR", which aimed at helping the fired or imprisoned workers and their families. The members of this Committee also inspired the establishment of the Free Trade Unions in 1978.<sup>98</sup>

Many historians believe that the election of Karol Wojtyła as a new Pope on 16 October 1978 and his first pilgrimage to Poland (on 2-10 June 1979) strengthened the resolve of the people.<sup>99</sup> The ongoing economic crisis led to a new outburst of strikes in July 1980. The citizens' opposition to the imposed system together with the authorities' brutal suppression of the people, eventually led to the following critical juncture.

### 3.3 Outcome

The results of the Teheran Conference placed Poland under Soviet influence with no realistic option to avoid the Communist rule. Those decisions resulted in a system full of terror and economic instability. Not only the institutions of direct democracy did not belong in this system, but the system itself could not even be called democratic. After less than ten years from the moment of the establishment of that system, the strikes and

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<sup>96</sup> Marian Kallas, p. 275.

<sup>97</sup> Ibidem, p. 276.

<sup>98</sup> Ibidem, p. 277.

<sup>99</sup> Ibidem, p. 278.

protests that regularly broke out did not allow the Communist regime to fully stabilize.

The Communist rule showed no respect for the opinion of the people and the Polish citizens did not identify themselves with that system (hence the constant existence of underground opposition and strikes). Nevertheless, this period ended up having a deep impact on shaping political awareness among the Poles, as it did not give them any opportunity to learn what civil responsibility and civil society meant. This lack of political education is particularly visible even today in the low turnout rates for public votes.<sup>100</sup> This phase further shaped to some extent the mentality of the authorities who still nowadays seem to distrust the citizens with making decisions for themselves.

#### **4 Phase 3: 14 - 31 August 1980**

In this part, the last critical juncture and the path leading to its outcome will be analyzed. As it was outlined in the previous section, the accumulation of strikes and protests on the one hand and the poor economic state of the country on the other, began to weaken the regime. The resolution of this conflict between the citizens and the authorities did not result in a long-term outcome, but instead in the next critical juncture which set the institutional trajectory on a path which allowed a moderate inclusion of the direct democracy institutions into the Polish legal framework.

It is particularly striking, that Poland, despite the fall of Communism, is still nowadays on the same path which was set by the events of 1980 with regard to the regulation of direct democracy institutions. This may be surprising as the political changes in 1989 also resulted in the change of the political system in Poland. Nevertheless, the original introduction of the institutions of direct democracy in Poland, which took place in 1987 (and was a result of the August 1980 events), affected their legal framework so strongly, that no further occurrence, including the political system change, did influence it since then. Naturally, over the years the laws on these institutions were amended, the institution of popular initiative was even introduced - but the general idea behind these institutions, the way they have been perceived by the authorities and by the citizens, and, most importantly - their functions, were not transformed.

#### **4.1 Critical juncture and its antecedent conditions**

##### **4.1.1 Introduction**

The last critical juncture that was observed in the 20<sup>th</sup> century Poland consisted of the events which occurred in August 1980. This was a path-

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<sup>100</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 305.

breaking moment which influenced the change of the system and at the same time allowed eventually for the institutions of direct democracy to be introduced,<sup>101</sup> which was not evident from the very beginning. In this case, the tensions in Poland, described in the previous section, led to the crucial moment that changed the trajectory of Polish history. From that moment onwards, it was foreseeable that the Soviet regime would be eventually abandoned.

#### 4.1.2 Antecedent conditions

As pointed out earlier, the events of August 1980 did not occur suddenly. They were the result of the growing social and political tensions. The Communist rule applied in the People's Republic of Poland was not accepted by the citizens. The people started responding with protests against the terror and oppression. A new wave of strikes began in July 1980, due to the increase of prices, but it was also a response to the degenerating political and economic system. Finally the protests reached their climax in August 1980.

#### 4.1.3 Critical juncture

The strikes took place on the whole Poland's territory and soon an Inter-enterprise Strike Committee was established, with Lech Wałęsa as its leader. The Committee summarized the strikers' demands which were denied the First Secretary of the Central Committee of the Communist Party. However, the development of the events forced the authorities to begin the negotiations with the Strike Committee.<sup>102</sup> As a result, the so-called "August Agreements" or "Gdańsk Agreements" (*Porozumienia sierpniowe* or *Porozumienia Gdańskie*) were signed on 31 August 1980. Their significance was extraordinary. The Communist authority concluded for the first time a social contract with the people which had legal consequences. The Communist Government agreed that new trade unions could be registered and not discriminated against.<sup>103</sup> This allowed creation of the first free trade union NSZZ Solidarność, which acted as the political opposition.

The critical juncture itself can be characterized by a relative contingency, as the result of the strikes could not have been foreseen at the moment of their breakout. The economic situation in the country and the difficulties the Communists faced (also abroad) were not without bearing on

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<sup>101</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 15, Jerzy Kuciński, Polskie referendum 29 listopada 1987 r., Państwo i prawo, Vol. 2 (516)/1989, p. 45 and Jerzy Jaskiernia, Prawnoustrojowe i społeczno-polityczne doświadczenia referendum z 29 listopada 1987 r., in: Danuta Waniek/Michał T. Staszewski (ed.), Referendum w Polsce współczesnej, Warszawa 1995, p. 77-78.

<sup>102</sup> Marian Kallas, p. 279.

<sup>103</sup> Ibidem.

the choices of the actors, namely the Communist authorities and the leaders of the opposition. These choices were rooted in the historical occurrences of the time and due to this they were not random. However, the scenarios of these events and their development could have been various, such as for instance the USSR responding with a military suppression and not leaving the suppression of the strikes to the Polish authorities only.

This moment in Polish history is considered to be deterministic in respect of the reintroduction of the democratic system. This event in itself does not entail an automatic introduction of direct democracy mechanisms. Nevertheless, without this point in history - without such a strong opposition of the Polish Nation - the mentioned changes could not have ensued. Polish historians agree on the fact that the events of August 1980, and also the subsequent foundation of the first free trade union (which functioned as a formally legal political opposition) on 17 September 1980, were one of the most important events in the Polish 20<sup>th</sup> century history.<sup>104</sup> In relation to the development of the direct democracy institutions, the Communists' perception of Poland changed and led to the gradual introduction of tools that would involve the people in the decision-making process.

## **4.2 Path-dependent process**

### **4.2.1 Production phase**

While the Communist regime tried to suppress people again and to destroy the opposition by introducing martial law on 13 December 1981,<sup>105</sup> the turnaround could not be reversed. The sequence of events that followed eventually formed a new system and laid the foundations for direct democracy mechanisms.

At that time, the necessity to introduce some democratic features into the system started to be perceived as imminent by the Communists. The direct democracy mechanisms were supposed to prevent the future social and political crises.<sup>106</sup> One of the solutions discussed was the introduction of referendums on both, local and national level. This option was accepted by the ruling Communist Party, the Polish United Workers' Party (*Polska Zjednoczona Partia Robotnicza*, PZPR) and was entered into its program.<sup>107</sup> The introduction of the institution of legislative popular initiative was also

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<sup>104</sup> Ibidem, p. 278.

<sup>105</sup> The martial law (*stan wojenny*) lasted until December 31<sup>st</sup>, 1982 when the State's Council's resolution from 19 December 1982, suspending the martial law application came into force. It was finally lifted on July 22<sup>nd</sup>, 1983, as provided for by the State's Council resolution from 20 July 1943; Marian Kallas, p. 284.

<sup>106</sup> Jerzy Jaskiernia, *Ustawowa regulacja*, p. 3 and Jerzy Kucinski, *Polskie referendum*, p. 45.

<sup>107</sup> Anna Rytel-Warzocha, *Referendum ogólnokrajowe*, p. 103, Jerzy Kuciński, *Polskie referendum*, p. 45 and Henry E. Brady/Cynthia S. Kaplan, p. 184.



proposed in the constitutional law doctrine, but this idea was not implemented.<sup>108</sup>

The first draft of the law on the referendum was prepared in 1984 by the Patriotic Movement for National Revival (*Patriotyczny Ruch Odrodzenia Narodowego*, PRON), a procommunist political organization created in 1982 to demonstrate social support for the Communist Government (however, some of its members also belonged to the Communist Party). The discussion over the final version and various legislative options lasted for four years.<sup>109</sup> Finally, in 1987 a draft of the law on the popular consultations and referendum was submitted to the *Sejm* by a group of 115 Deputies. In its justification, they stressed that those institutions should be introduced to fully implement socialist democracy and to broaden the participation of the people in the power wielding.<sup>110</sup> This statement was also mentioned in the preamble to the final law of 6 May 1987 on the popular consultations and referendum.<sup>111</sup>

During the parliamentary debates, various options were analyzed. Some Deputies opted for the introduction of an obligatory referendum, but this option was rejected before even a consensus was reached with regard to the matters that would be subject to such an obligatory referendum.<sup>112</sup> It was also considered, whether the referendum should be introduced only at the local level, as the Board of the *Sejm* Advisors proposed. After all, the *Sejm* Commission which worked on the final draft of the law stated that the introduction of a nation-wide referendum was necessary to broaden the citizens' possibilities to state their opinions on various topics.<sup>113</sup> Another dispute evolved on the notion of the character of the referendum and whether it should be consultative as opposed to binding. The draft submitted by the Deputies provided for a binding referendum. However, it introduced a requirement that the result of the referendum would only be binding when more than a half of the people entitled to take part in it voted in favor of a particular option. This proposal was eventually chosen for the final version of the law.<sup>114</sup> Such a prerequisite for the binding force of the referendum should be considered as extremely restrictive. This point of view was also mentioned during the parliamentary debates, but the majority of the Deputies claimed that if the referendum result was to be binding, it should be certain that the majority of the people entitled to make a decision, supported the particular option chosen.<sup>115</sup>

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<sup>108</sup> Piotr Uziębło, Ustawa z 1999 roku o wykonywaniu inicjatywy ustawodawczej przez obywateli, *Przegląd Sejmowy*, Vol. 4 (39)/2000, p. 48 citing A. Szmyt, W sprawie inicjatywy ustawodawczej, *RPEiS*, Vol. 2/1986, p. 100.

<sup>109</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 3-4, Anna Rytel-Warzocho, Referendum ogólnokrajowe, p. 103-104 and Jerzy Kucinski, Polskie referendum, p. 45.

<sup>110</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 4 and Jerzy Jaskiernia, *Prawnoustrojowe*, p. 78-79.

<sup>111</sup> Dz.U. 1987.14.83.

<sup>112</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 13.

<sup>113</sup> Jerzy Jaskiernia, *Prawnoustrojowe*, p. 79.

<sup>114</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 13-14 and Jerzy Jaskiernia, *Prawnoustrojowe*, p. 82-83.

<sup>115</sup> Jerzy Jaskiernia, Ustawowa regulacja, p. 14.

On 6 May 1987, the day of the adoption of the law on popular consultations and referendum (thereafter "the 1987 law"), the Constitution of the People's Republic of Poland was also amended. The change introduced in Article 2 of the Constitution provided for the people's participation in the decision-making process through the institution of referendum. The institution itself was to be regulated in an act of law.

The law on popular consultations and referendum introduced the institution of facultative popular consultations and facultative referendum. Neither of these institutions could be applied to issues relating to security or defense of the country and the armed forces of the People's Republic of Poland, nor to issues considered as a State secret (Article 4 of the law on popular consultations and referendum). This law actually only broadened the application possibilities for the popular consultations, as this mechanism had already been introduced in the 1970s. When the new law came into force, not only the citizens, but also the Patriotic Movement for National Revival, other political organizations, local authorities, trade unions, farmers', women's, sport and various other organizations were entitled to participate in the consultations. Therefore, according to Article 5 of the law on popular consultations and referendum, a particular citizen's voice could actually be heard twice: by him/her stating his own opinion and through the organization to which he/she belonged.<sup>116</sup> The consultations could be launched either *ex officio* by the entitled authority (i.e. the *Sejm*, the State Council, the Council of Ministers or the Prime Minister and Ministers at the national level and by the local authorities at the local level) or by these same authorities but upon a motion requesting consultations, filed by national or local (depending on the range of the consultations) agencies of the Patriotic Movement for National Revival (Articles 7 and 8 of the 1987 law). The scope of the issues that could be submitted to consultations was wide and ranged from general guidelines to proposals of acts of law or their particular provisions issued by the authority launching the consultations (Article 7 of the 1987 law).

The referendum, on the other hand, was introduced into the Polish legislation for the first time,<sup>117</sup> as the referendums conducted in 1946 were based on laws enacted only for a one-time purpose. According to Article 12 (1) of the 1987 law, only the citizens possessing voting rights in parliamentary elections and residing in Poland at the time of the vote were eligible to participate in the nation-wide referendum. With regard to local referendum, Article 12 (2) provided that citizens registered for a permanent stay on the territory subject to the vote, were entitled to participate in it. The authorities empowered to launch a referendum were the *Sejm* (for the national referendum) and the local National Council (for the local referendum). Both of these bodies needed a majority of at least 2/3 of the votes in a presence of at least half of all Deputies to make a decision in this matter (Article 14 (1) - (3) of the 1987 law). These authorities could act either on their own or upon a motion filed by the State Council, the Council of Ministers, National Council of the Patriotic Movement for National Revival (in the case of the national referendum) and the Presidiums of National Councils, local state authorities and Councils of the Patriotic Movement for National

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<sup>116</sup> Ibidem, p. 7.

<sup>117</sup> Ibidem, p. 11.



Revival (in case of the local referendum), as provided by Article 15 of the 1987 law. In a national referendum, the *Sejm* could submit either precisely formulated issues or specific legal options for legislative drafts which related to main areas of State activity. Local referendums were to be launched in relation to local issues or options adopted for the local acts of law (Article 14 (1) and (2) of the 1987 law). The lack of the provisions allowing the people (the sovereign) to launch the referendum (for instance by formulating a binding motion that would be filed with the *Sejm*) was criticized in the literature.<sup>118</sup> It was therefore still the Communist authorities that were to decide if the sovereign could express their view or make a binding decision (depending on the turnout) through the referendum.

The 1987 law - even before it entered into force - was considered to be a proof of the changes that had begun in the People's Republic of Poland in 1980, as it was the authorities' answer to the people's protests. The changes were not considered radical, as it had taken over seven years for this law to be passed and the future practical use of consultations or referendums was not expected to be significant.<sup>119</sup> However, the institution of the local referendum seemed much more promising to scholars at the time. It was easier and less expensive to carry out (because of its limited territorial scope) and had the potential to make the people co-responsible for their local communities.<sup>120</sup>

To the surprise of some scholars, the law on national referendum was soon put in practice.<sup>121</sup> On 7 October 1987, the National Council of the Patriotic Movement for National Revival filed a motion with the Speaker of the *Sejm* for the lower chamber of the Parliament to consider launching a referendum on economic reforms and democratization of public life. The aim of this motion was to let the Polish citizens take a stand on the structure and content of the "Polish path to Socialism."<sup>122</sup> The Communist Party supported this referendum as the country faced an economic crisis. It was certain that significant reforms could not be introduced in traditional fashion,<sup>123</sup> without the consent of the people as this could lead to a severe political unrest. The *Sejm*'s resolution on launching the nation-wide referendum was taken already three days later, on 10 October 1987. It did not formulate yet any particular questions (those were supposed to be established in a further resolution) but only stated that the subject of the referendum would be further reforms of the state and the economy. The date of the referendum was set for 29 November 1987.<sup>124</sup>

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<sup>118</sup> Jerzy Jaskiernia, *Prawnoustrojowe*, p. 87 and Michał T. Staszewski, *Referendum oprotestowane*, in: Danuta Waniek/Michał T. Staszewski, *Referendum w Polsce współczesnej*, Warszawa 1995, p. 91.

<sup>119</sup> Jerzy Jaskiernia, *Ustawowa regulacja*, p. 15 and Jerzy Jaskiernia, *Prawnoustrojowe*, p. 77-78.

<sup>120</sup> Jerzy Jaskiernia, *Ustawowa regulacja*, p. 15

<sup>121</sup> Jerzy Kuciński, *Polskie referendum*, p. 46.

<sup>122</sup> *Ibidem*, p. 46-47.

<sup>123</sup> Jerzy Jaskiernia, *Prawnoustrojowe*, p. 86.

<sup>124</sup> Resolution of the *Sejm*, M.P. 232.30.1987, Jerzy Kucinski, *Polskie referendum*, p. 47.

The actual questions were only formulated about two weeks later, on 23 October 1987. The lower chamber of Parliament decided in its resolution to ask the people the following questions: (1) Do you support the full implementation of the radical program of economy reforms presented in the *Sejm*, which leads to a significant improvement in society's living conditions but involves a difficult period of adjustment lasting two or three years? and (2) Do you support the Polish model of deep democratization of political life, which aims at strengthening self-governance, broadening citizens' rights and increasing their participation in ruling the country?<sup>125</sup> The referendum campaign had started even before the two questions were formulated and lasted only 37 days. It was considered to be too short, especially due to the complexity of the questions posed<sup>126</sup> and to the fact that it was the first referendum in over forty years.

On the referendum day, 67,32% of people entitled to participate in the vote, took part in it. The majority of the participants gave positive answers to both questions (66,04% for the first question and 69,03% for the second question).<sup>127</sup> While such a high participation rate may be a sign of success of the referendum, its result was not binding because the number of votes supporting either of the options did not exceed the threshold which required that half of the citizens entitled to take part in the referendum support a given option.

Some commentators criticized again this law as being too strict and harmful to citizens who had chosen to be active in the decision-making process, as the binding result of the referendum depended on people who actually refused to participate in it.<sup>128</sup> Despite this criticism some authors considered this particular referendum to be a sign of a new quality on the Polish political scene.<sup>129</sup> Barcikowski considered that this referendum differed significantly from the referendums and plebiscites launched in Poland until then. This time the voting was not treated by the people (or at least by the majority of the voters) as a confidence vote for the authorities but rather as an opportunity to give their opinion on the issues presented.<sup>130</sup> On the other hand, it must be pointed out that the questions for this referendum were formulated in such an unclear and enigmatic way that it could not be determined with certainty to what exactly the citizens were agreeing to.<sup>131</sup> Therefore, the formulation of the questions did not fulfill the democratic standards and did not allow the people to participate meaningfully in the decision-making process.

At first, it appeared that referendums would be used more often from then on, as the Polish United Workers' Party declared that the referendum

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<sup>125</sup> Resolution of the Sejm, M.P. 245.32.1987.

<sup>126</sup> Jerzy Kucinski, *Polskie referendum*, p. 50.

<sup>127</sup> *Ibidem*, p. 51-52.

<sup>128</sup> *Ibidem*, p. 52 citing Z. Mank, *Pułapki superdemokracji*, *Gazeta prawnicza*, Vol. 50/1987, p. 12 and Jerzy Jaskiernia, *Prawnoustrojowe*, p. 86-87.

<sup>129</sup> Jerzy Kuciński, *Polskie referendum*, p. 54 citing A. Barcikowski, *Polskie referendum - nowe doświadczenia socjalistycznej demokracji*, *Ideologia i polityka*, Vol. 1/1988, p. 30-31.

<sup>130</sup> *Ibidem*, p. 30-31.

<sup>131</sup> Jerzy Jaskiernia, *Prawnoustrojowe*, p. 86.

was included in the socialistic democracy to allow the population to state its opinion.<sup>132</sup> The 1987 Polish referendum raised also interest in this form of governance in the USSR. During the 19<sup>th</sup> Union Conference of the Communist Party of the Soviet Union the leaders stressed the importance of direct democracy processes, especially on the local level. However, time has proven the assumption on the future popularity of the referendum to be wrong. Therefore, one can assume that in fact the Communist authorities did not really want people to participate broadly in the decision-making process. Not only were the requirements for the binding result of the referendum very strict, but also the opposition had no real possibility to launch a referendum or to submit a motion to the State bodies for the mere consideration of launching a referendum.

This referendum was also a sign that the nation-wide changes that began in 1980 were still enduring. Some authors claimed that a fairly high percentage of voters who gave negative answers to the questions asked was yet another sign of an on-growing discrepancy between the public opinion and the Communist authorities.<sup>133</sup> Most importantly, the structure of the referendum created in 1987 laid the foundations for direct democracy institutions in the Third Republic of Poland. The institutional pattern provoked by the 1980 critical juncture and described in this production phase provided for the inclusion of the institutions of direct democracy in the legal system in order to give the citizens the impression that they had an influence on the choices made by the authorities. These institutions were constructed in a way which did not allow the citizens to effectively take part in the decision-making process.

#### **4.2.2 Reproduction phase**

This section describes how the institutional pattern created after 1980, namely the inclusion in the legal system of a limited version of direct democracy mechanisms, repeated itself throughout time. These institutions, despite the numerous amendments, do not allow citizens until today to take action and to effectively supplement the representative political system. The changes introduced by the Legislature into the laws regulating the institutions of referendum and popular initiative were not aimed at changing this situation, but rather at creating an impression that the authorities are trying to reform the system. They have never, however, had any incentive to do so. Further, the citizens have not shown for a long time any discontent with this *status quo*.

As this section deals with numerous direct democracy laws introduced since the end of the 1980s, it has been divided into four subsections for a clearer description of the process. First, the direct consequences of the fall of the Communism are discussed. Second, the formation of the new democratic Constitution is dealt with. The legal framework of the direct democracy mechanisms introduced by the 1987 law prevails in this Constitution with

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<sup>132</sup> Jerzy Kucinski, *Polskie referendum*, p. 54-55.

<sup>133</sup> Jerzy Jaskiernia, *Prawnoustrojowe*, p. 87-88.

only slight adjustments to the new political system. Subsequently, the reform of the direct democracy laws is presented. The changes introduced by this reform did not, however, influence the character of the direct democracy mechanisms implemented in Poland. In the last part of this section, the practical aspects of the application of direct democracy mechanisms are described, showing the activity in this field of both, the authorities and the people.

#### **4.2.2.1.1 The fall of the Communism**

The creation of free trade unions and the introduction of the institutions of direct democracy in the limited scope was not sufficient to calm the people. The leaders of the opposition saw the opportunity to put the Communists under more pressure and they acted upon it by means of strikes. This difficult situation in the country led the Communists to start negotiations with the opposition. The economic crisis was deteriorating and they needed at least some social support to be able to engage in the reforms, as it was the people who would have to bear the costs of those reforms. After a series of strikes, which took place in April-May, August and December 1988, a breakthrough point appeared in 1989 with the fall of the Communism.<sup>134</sup>

In this case, however, this particular moment in time did not constitute another critical juncture nor even was it a part of the reactive sequence in relation to the development of the direct democracy institutions. It would not result in a change of the trajectory in the development of the institutions of direct democracy. This moment in time was not contingent; it was a direct result of the changes that began with a critical juncture in August 1980. Nevertheless, even if we bear in mind that contingency must not necessarily be a characteristic of a critical juncture,<sup>135</sup> in 1989 the choices of the political actors were already determined by the previous events and were not that broad. For the opposition, it was obvious that the people would not accept any other political system but a democratic one. The institutions of direct democracy were already introduced as a result of the 1980 events. Therefore, revoking them could be regarded as moving a step backwards in the development of the system and could not be easily accepted by the people (they could have treated it as a potential attack on their rights). Besides, the opposition did not even consider limiting people's rights. At that time, there was no political pressure (originating from the population) nor a need (felt on behalf of the opposition) to widen the scope of the direct democracy institution. As it will be shown later, the further, yet limited, development of the direct democracy institutions was strongly marked by their primary construct, which was a result of the 1980 events. This way again in 1989, as in 1918, Poland found itself at a historical point where decisions about the future shape of its system had to be made. Nonetheless, this time the direction of the changes concerning direct democracy institutions was already

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<sup>134</sup> Marek Dobrowolski, *Ustrój państwa w porozumieniach Okrągłego Stołu*, *Przegląd Sejmowy*, Vol. 3 (92)/2009, s. 78.

<sup>135</sup> James Mahoney/Daniel Schensul, p. 462.

set by the events of 1980. Therefore, the events of 1989 had no bearing on the shape of the direct democracy institutions as their structure would remain a relic of the former political system. From this moment onwards, the structures of the direct democracy institutions, including even the newly introduced popular initiative, were, as it may be observed, repetitions and variations of the institutional concept created in the 1980s.

On 7 April 1989, the Constitution of 1952 was amended to mark the official change of the political system in the country. The Parliament elected in June 1989 engaged in parliamentary works on the new Constitution but did not succeed in agreeing on the final version of the draft. Possibly, it was due to the fact that the Parliament, whose Deputies were partially (65% of the seats in the lower chamber of the Parliament, the *Sejm*) appointed by the old regime, did not have people's legitimization to enact the new Constitution which was to be the legal base of the political system of a finally free country.<sup>136</sup>

At the same time, a new debate over launching nation-wide referendums started, among others on the question whether the Parliament should enact the new Constitution, or if it should be enacted by the new, fully free-elected Parliament. The Deputies also wanted to ask the population if the second chamber of the Parliament – the *Senat* – should exist in the new political system and if the term of the present Parliament should be shortened. The idea of the referendum was supported by the left-wing parties, including the authors of the motion to launch a referendum, the Deputies' Club of the Democratic Party (*Stronnictwo Demokratyczne*, SD), who claimed that such crucial questions should be put to the sovereign.<sup>137</sup> The majority of the Deputies did not agree to launch this referendum – they insisted that the costs would be too high and that it could interfere with the Presidential elections<sup>138</sup> (that were to be held in 1990; this referendum was supposed to be launched on the day of the elections<sup>139</sup>). Some Deputies also stated that launching a referendum would require a long preparation and citizens' education, as the people did not understand the institution of a referendum.<sup>140</sup>

Another issue that needed to be urgently regulated in the opinion of many Deputies was the right to abortion. During the times of Communist regime, the law on abortion (dating back to 1956) was very liberal and the debates about the introduction of stricter provisions began already in June 1989. Many Deputies wanted the people to decide on the new abortion law through the referendum but the Episcopate and the conservative parties were

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<sup>136</sup> Janina Zakrzewska, *Spór o konstytucję*, *Przegląd Sejmowy*, Vol. 3/1993, p. 27-28.

<sup>137</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 188 and Michał T. Staszewski/Jacek B. Falski, *Referendum w praktyce parlamentarnej X, I i II kadencji Sejmu Rzeczypospolitej Polskiej*, in: Michał T. Staszewski/Danuta Waniek (ed.), *Referendum w Polsce i w Europie Wschodniej*, Warszawa 1996, p. 14.

<sup>138</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 189.

<sup>139</sup> Michał T. Staszewski/Jacek B. Falski, p. 12.

<sup>140</sup> *Ibidem*, p. 14.

not willing to submit such matters to the vote of the people.<sup>141</sup> After all, in January 1991, the *Sejm* launched popular consultations on this matter. Over 1 700 000 people took part in this process but the result was not conclusive, as there was no particular question to be answered and people merely stated their general opinion.<sup>142</sup> In the end, the referendum was not launched as conservative opinions, strongly influenced by the Episcopate, prevailed in the Parliament.<sup>143</sup>

These episodes are worth recalling as they show that, already at the beginning of the existence of the Third Republic of Poland, the *Sejm* decisions with regard to launching referendums were not meant to give the people the right to decide on crucial issues, but were rather used instrumentally to achieve political ends. This attitude already then proved that the 1989 events and the future adoption of the new Constitution could not change much in reference to the design of the direct democracy mechanisms introduced previously, but instead it would just keep duplicating their previous form.

#### **4.2.2.1.2 The New Constitution and the old legal framework of direct democracy**

It took a long time for the works on the new Constitution to fully begin. The Parliament entirely free-elected in 1991 finally took up this task. Although there were plans to enact the new Constitution on the 3 May 1991, on the 200 years anniversary of the enactment of the 3 May Constitution of 1791, those plans were not followed up by any significant actions. Some authors even assumed that the Polish history taught the Polish Nation to get by without established Constitutions that would guarantee the citizens' rights, and so, no one felt the pressure to change the *status quo*.<sup>144</sup> Temporary laws were thus enacted to set the provisional structure of the political system for the time during which the new Constitution would be prepared. On 23 April 1992, the Parliament passed a law solely regulating the procedure of the enactment of the new Constitution (thereafter "the April 1992 law"). This law regulated also, in the Article 2a, amended on 22 April 1994,<sup>145</sup> the first in Polish history popular initiative. This provision provided for the right of 500 000 citizens to submit their draft of the Constitution.<sup>146</sup> This initiative was foreseen only for this one particular instance and the people's proposal would not be directly submitted to popular voting but subject to parliament's legislative procedure. It should, therefore, not be considered as a significant step forward in the creation of the direct democratic institutions. On 17 October 1992, another so-called Small Constitution was enacted, namely the

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<sup>141</sup> Michal T. Staszewski, p. 91.

<sup>142</sup> Ibidem, p. 92.

<sup>143</sup> Ibidem, p. 92-96.

<sup>144</sup> Janina Zakrzewska, p. 27.

<sup>145</sup> Dz.U.1994.61.251.

<sup>146</sup> Piotr Uziębło, Ustawa z 1999 roku, p. 47 and Paweł Sarnecki, Idee przewodnie Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r., Przegląd Sejmowy 5(22)/1997, p. 21.



Constitutional Act on the relations between the Legislature and the Executive (thereafter "the October 1992 law").<sup>147</sup>

These above-mentioned legal acts provided for three types of referendum - a constitutional one (an obligatory referendum for a ratification of a new Constitution stated by the April 1992 law) and two kinds of a facultative referendums - on the rules governing future Constitution (Article 2c of the April 1992 law) and on important issues (Article 19 of the October 1992 law). The constitutional referendum was to be launched by the President and it did not require a *quorum*. The Constitution would be ratified if the majority of the voters supported it (Article 11 (1) of the April 1992 law). The facultative referendum could be organized either upon the *Sejm's* decision or upon the President's initiative with the *Senat's* consent and would be binding only if more than a half of all eligible voters participated. Otherwise the referendum only had a consultative character, as stated by Article 19 of the October 1992 law. Article 72 (2) of the Small Constitution was also a legal base for the local referendums.<sup>148</sup>

During the Parliamentary work in 1995, the Labor Union Party (*Unia Pracy*) suggested that an *ante legem* referendum on the issues related to the future shape of the constitution should be launched, as the results of such a referendum would be useful in preparing the final parliamentary draft of the Constitution. Eventually, the required amount of Deputies' votes (absolute majority of the members of joined Parliament chambers) was not gathered and the referendum did not take place.<sup>149</sup>

The new full law on referendums, which replaced the law of 1987, was provided for in the law on referendum of 29 June 1995 (thereafter "the 1995 law").<sup>150</sup> During the parliamentary work, a sub-commission was established (created by the members of the *Sejm's* Legislative Commission and Justice Commission) to prepare the draft law on the referendum. On the plenum of this sub-commission, it was concluded that the new act should provide for a general type of referendum, instead of only a constitutional one as was previously suggested by some Deputies.<sup>151</sup> This law on referendum regulated all types of the referendums that could be carried out at the national level, according to the two above-mentioned Constitutional Acts that were then in force. The referendums were divided according to their subject matter, namely: a constitutional referendum (including an obligatory referendum on the ratification of the Constitution and a facultative *ante legem* referendum on the basic principles governing the future Constitution) and a facultative referendum on important issues. Both of the constitutional referendums were based on the Constitutional Act of 23 April 1992 and the 1995 law only referred to the already existing provisions of that act, stating additionally who

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<sup>147</sup> Dz.U.1992.84.426.

<sup>148</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia w Polsce po 1989 r.*, Przegląd Sejmowy, Vol. 1 (72)/2006, p. 11.

<sup>149</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 192-195.

<sup>150</sup> Dz.U.1995.99.487.

<sup>151</sup> Józef Repel, *Nowa ustawa o referendum*, Przegląd Sejmowy, Vol. 2 (19)/1997, p. 23-24.

is eligible to participate in these referendums. The facultative referendum on important issues had its legal base in the Constitutional Act of 17 October 1992. The referendum on important issues could, therefore, still be launched either by the *Sejm* or by the President with consent of the *Senat* (Article 4 (1) of the 1995 law). The *Sejm* could make this decision either *ex officio* or upon a motion coming from the *Senat*, the Council of Ministers or a group of 500 000 citizens (Article 5 (1) and 6 (1) of the 1995 law). The citizens were not, however, equipped with any legal tools that would allow them to influence the *Sejm*'s proceeding with their motion.

The 1995 law on referendum was used once in practice. On 18 February 1996 a popular vote on various privatization aspects was held. The privatization of the State property was a difficult process in all of the post-Soviet countries. The public companies operating during the Communist times were built with a forced support of all of the citizens. Therefore, the transformation of the ownership system was necessary. In Poland, it started in 1990, after the enactment of the law on the privatization of the public entities, when the shares in five major State-owned companies were put up for sale. Apart from that, other privatization programs were also introduced.<sup>152</sup> Nevertheless, the NSZZ Solidarność, criticizing these processes (stating that not all of the State companies are included in them, as well as not all of the citizens could benefit from the privatization), submitted a trade union proposal regulating the privatization processes, according to which all of the citizens would be the beneficiaries of the privatization and most of the State property would be subject to it. The referendum on this issue was ordered by the President (with the *Senat*'s consent). The President formulated the first, very broad question, namely: Do you support a popular enfranchisement (*uwłaszczenie*) of the citizens?

In response to this, the *Sejm* also decided to launch a referendum on privatization and formulated the following four questions which were supposed to specify the first presidential question:<sup>153</sup> (1) Do you agree that the obligations towards the pensioners and the public employees, which arise from the Constitutional Tribunal judgments, should be satisfied from the privatized State's property?; (2) Do you agree that the part of the privatized State property should be included into the National Pension Fund?; (3) Do you agree that the share certificates of the National Investment Fund should be increased by including in the Fund further enterprises?; and (4) Do you agree that the privatization vouchers (*bon prywatyzacyjny*) should be included in the privatization process?

While the *Sejm*'s questions were meant to clarify the question formulated by the President, they themselves were very unclear, as the Deputies used many imprecise words, such as "the public employees" (without giving a definition of that term) or "fulfilling the obligations resulting from the Constitutional Tribunal judgments" (even though the judgements did not precisely stipulate those obligations).<sup>154</sup> Both referendums were to take place on the same day - 18 February 1996. The people's interest in the referendum was relatively low. As commentators stated, it was due to the

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<sup>152</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 166-167.

<sup>153</sup> *Ibidem*, p. 168-169.

<sup>154</sup> *Ibidem*, p. 173-174.



complexity and lack of clarity of the questions. Further, the President Lech Wałęsa was not re-elected for the second term at the end of 1995, which resulted in a limited referendum campaign of the presidential office.<sup>155</sup> The referendum campaign was in general described as inadequate and chaotic. Some authors also stated that this referendum was in fact used by the NSZZ Solidarność as a plebiscite, to show that the trade union was still an important political actor.<sup>156</sup> The participation rate in the President's referendum amounted to 32,40% and in the *Sejm*'s referendum to 32,44%. The referendum results were therefore not binding. In response to the first, second, third and fifth question, the participants gave positive answers (respectively: 94,54%, 92,89%, 93,70% and 88,30% valid votes in favor). The fourth question was answered negatively - with only 21,86% valid votes in favor.<sup>157</sup> This particular referendum experience could not be portrayed as a good democratic lesson for the citizens. The citizens were not sufficiently informed about the issues at stake. Further, experts themselves had difficulties in understanding the questions posed in the referendum.

The provisions on local referendums were provided for even earlier than the laws on the nation-wide referendums, namely in the law of 8 March 1990 on local government, which was soon supplemented by the law of 11 October 1991 on community referendum.<sup>158</sup> This latter law had to be introduced, as the law on popular consultations and referendum was no longer adequate to regulate the local referendums in the new historical context. Both laws provided for the referendum on important local matters, for referendums on self-taxation of the community, for the institution of the recall of the local council (the only local body at that time coming from popular elections) and for the popular initiative for launching a referendum. The decisions on self-taxation and on the recall of authorities could be made only by means of a referendum. In relation to those issues, the referendum was of an obligatory character (Article 1 (3) of the law on community referendum). The motion for such a popular vote was binding if it was signed by 1/10 of the eligible voters from the said community (Article 13 (1) of the law on local government). The time for the collection of the signatures was limited to only 60 days counted from the moment of the notification filed with the governor of the community (Article 10 (1) of the law on local government). The referendums on important matters and on self-taxation could also be launched by the Community Council acting *ex officio*. The prerequisites governing the use of this institution in 1991 were yet not too demanding, as for the referendum to be valid, the participation of 30% eligible voters was required. It was conclusive when over a half of the valid votes favored a particular option (with the exception of self-taxation, where the referendum would only be conclusive when 2/3 of votes were cast in favor or against a particular option).

The initial requirements for the recall referendum introduced by the act on local government were more severe, as that act required 1/5 of the eligible voters to sign the motion for the launching of the recall referendum. For this

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<sup>155</sup> Ibidem, p. 174.

<sup>156</sup> Ibidem, p. 176.

<sup>157</sup> Ibidem, p. 175.

<sup>158</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 12.

referendum to be valid, at least 50% of the eligible voters had to take part in it. These requirements were, however, repealed on 14 December 1991 by the virtue of the law on community referendum<sup>159</sup> and from then onwards the prerequisites for the validity of the recall vote were the same as in the case of the other local referendums.

These laws on the direct democracy institutions were based on the Constitutional Acts of only a provisional character, which could not replace the regular, stable Constitution. The actual legislative process on the enactment of the new Constitution started when the Presidential proposal for a new Constitution was submitted to the *Sejm* in March 1992. This draft provided only for a constitutional referendum. The first two Deputies proposals for the new Constitution were submitted in December 1992 (one was submitted by a group of Deputies from a few political parties, i.a. the Democratic Union, the Work Union and Centre Agreement and the other proposal was submitted by the conservative party, namely the Christian National Union). Both proposals also included the institution of a constitutional referendum. The former proposal foresaw the constitutional referendum as the final stage of the adoption of the Constitution. The latter proposal, submitted by the conservative party, provided for a constitutional referendum only in a case when the President refused to sign the new Constitution.<sup>160</sup>

Some of the other Deputies' drafts contained proposals for a more developed and broader referendum mechanism, none of the proposals were, however, ground-breaking.<sup>161</sup> In 1993, seven Constitution drafts containing the direct democracy institutions were submitted to the *Sejm*. As it was stated in the literature, all of these proposals had one thing in common, namely their authors wanted to entrench direct democracy in the legal system but did not treat these instruments as tools allowing the citizens to perform their sovereign functions.<sup>162</sup> A right to referendum, as a general constitutional principle, was provided for by the drafts presented by the President, the *Senat*, the left-wing party Democratic Left Alliance (*Sojusz Lewicy Demokratycznej*, SLD) and Christian Democratic Party Centre Agreement (*Porozumienie Centrum*, PC). Other proposals contained various forms of referendum (a facultative referendum on repealing a law amending the Constitution, a consultative referendum on particularly important political decisions and an obligatory constitutional referendum). All of the major political parties agreed, however, on the character of the citizens' motion for launching of the referendum; it was meant to be non-binding.<sup>163</sup>

The citizens' right to submit a draft law by the means of a popular initiative institution was suggested in many drafts. Two of them were prepared respectively by the *Senat* and by the President (in both drafts 100 000 signatures were required). The others were submitted by various political

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<sup>159</sup> Dz. U.1991.110.473.

<sup>160</sup> Janina Zakrzewska, p. 28-29.

<sup>161</sup> Ibidem, p. 35 and Eugeniusz Zieliński, Referendum w państwie demokratycznym, in: Danuta Waniek/Michał T. Staszewski (ed.), Referendum w Polsce współczesnej, Warszawa 1995, p. 40-41.

<sup>162</sup> Eugeniusz Zieliński, p. 40-41

<sup>163</sup> Ibidem and Andrzej Kulig/Bogumil Naleziński, p. 31.

parties, namely: the SLD (with a requirement of 150 000 signatures), the Democratic Union (*Unia Demokratyczna*, UD, with a requirement of 2 000 000 signatures), the the Confederation of Independent Poland (*Konfederacja Polski Niepodległej*, KPN, with a requirement of 100 000 signatures) and the Polish People's Party (*Polskie Stronnictwo Ludowe*, PSL) in collaboration with the Labor Union Party (*Unia Pracy*, UP). These two latter parties prepared a joint proposal, in which a requirement for a popular initiative was set at only 50 000 signatures.<sup>164</sup> None of these drafts provided for an institution of a direct legislative popular initiative (which could be submitted directly to the vote of the people). The President's and the *Senat*'s drafts also provided for an institution of popular veto. In both cases, the launching of a popular vote aimed at repealing a law would require collecting 500 000 signatures.<sup>165</sup>

One Constitution draft was also submitted by the trade union NSZZ Solidarność. After the amendment in 1994 of the Constitutional Act of April 1992 on the procedure for the enactment of the new Constitution, the institution of a constitutional popular initiative was provided for. The trade union, still politically active, took advantage of this possibility and prepared their own draft.<sup>166</sup>

The Constitution was adopted by the National Assembly (a body consisting of both parliamentary chambers acting jointly) on 2 April 1997. The opinions about it varied. While some commentators claimed that this Constitution was a model regulation with regard to the provisions on the human rights, other found that it "belongs in the garbage".<sup>167</sup>

The constitutional referendum based on the Constitutional Act of 23 April 1992, the first one in the Polish history which concerned the ratification of a new Constitution, was held on 25 May 1997. Although there was no legal base for such a request, the parliamentary opposition and the NSZZ Solidarność wanted the draft prepared by the trade union and the Constitution adopted by the National Assembly to be submitted simultaneously to the popular vote.<sup>168</sup> The *Sejm* did not agree with this proposition. The citizens' participation in this constitutional referendum was moderate: 42,86% of the eligible voters attended the referendum. The Constitution was supported by 52,71% of the voters and 45,89% of them were against it (the amount of invalid votes amounted to 1,40%).<sup>169</sup>

This referendum also turned out to be a plebiscite of the political preferences among the citizens. When the results from particular voivodeships were compared with the results of the presidential elections held in 1995, it became clear that the parts of Poland that voted for Lech Wałęsa, now voted against the Constitution, and the voivodeships that voted

<sup>164</sup> Eugeniusz Zieliński, p. 40.

<sup>165</sup> Ibidem.

<sup>166</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 23 and Maria Kruk, *Prawo inicjatywy ustawodawczej w nowej Konstytucji RP*, *Przegląd Sejmowy*, Vol. 2 (25)/1998, p. 17.

<sup>167</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 177-178.

<sup>168</sup> Stanisław Gebethner, Poland, in: Andreas Aurer/Michael Bützer (ed.), *Direct Democracy: The Eastern and Central European Experience*, Aldershot 2001, p. 135-136 and Marcin Rachwał, *Demokracja bezpośrednia*, p. 179.

<sup>169</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 179-180.

in favor of Aleksander Kwasniewski, now supported enactment of the new Constitution (the Constitution was prepared mostly by the left-wing party, Democratic Left Alliance).<sup>170</sup>

The enacted Constitution finally formed a firm and permanent legal base for the institutions of direct democracy, as it provided for a nation-wide facultative referendum on important issues, a facultative referendum on the ratification of international agreements, a facultative referendum on amending the Constitution, a legislative popular initiative (of a group of 100 000 people) and a facultative local referendum on issues concerning the community, including a recall. In general, the constitutional law scholars stated that the scope of the provisions on direct democracy institutions, included in the new Constitution, fully guaranteed the rights of the people and prevented a situation where the Legislature could limit this right of citizens to participate in the decision-making process.<sup>171</sup> This statement can, however, be questioned, as the Constitution provides for a very limited use of the direct democracy mechanisms at the domestic level. The institutions of direct democracy were not treated as means allowing citizens to realistically influence political choices, but they were rather designed to keep up the appearances of a modern, democratic system.

#### **4.2.2.1.3 The reform of the direct democracy laws**

The limited legal framework of the direct democracy institutions was neither improved when the law on popular initiative was enacted on 24 June 1999 (thereafter "the 1999 law"), nor when the new law on nation-wide referendum was passed on 14 March 2003 (thereafter "the 2003 law").<sup>172</sup>

The former law regulates the first in Polish history legislative popular initiative available to the citizens (as the previous popular initiative was foreseen only for a particular purpose of the enactment of the Constitution). It is based on and further specifies the Article 118 (2) of the Constitution.<sup>173</sup> It should be reminded that it was not the first time that the institution of popular initiative was proposed in the Polish Parliament, as between 1919 and 1921 many constitution drafts also included this instrument. It was of course not provided for in the Constitution of the People's Republic of Poland of 1952, but it became more and more present in the constitutional law literature from the mid-1980s onwards, when the authors began to stress the need to include it in the Polish legal system.<sup>174</sup>

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<sup>170</sup> Ibidem, p. 180.

<sup>171</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 11 citing: M. Jablonski, *Wynik referendum a zasada dyskontynuacji prac Sejmu*, *Acta Universitatis Wratislaviensis*, Vol. XLI/1998, p. 115.

<sup>172</sup> Dz.U. 2003.57.507.

<sup>173</sup> Maria Kruk, p. 9.

<sup>174</sup> Piotr Uziębło, *Ustawa z 1999 roku*, p. 48 citing: A. Szmyt, *W sprawie inicjatywy ustawodawczej*, *RPEiS*, Vol. 2/1986, p. 100.

Judging by the form that the Deputies have decided to provide for this instrument, the popular initiative has been neither designed to enrich the regular legislative process, nor to really allow the citizens to effectively propose legal drafts (as only the popular initiative in a form of a precisely formulated law draft is foreseen by this law). Furthermore, the Constitutional provision regulating this institution is formulated in a way that does not place the popular initiative on equal level with other legislative initiatives.<sup>175</sup> The structure of the popular initiative is of an indirect character.<sup>176</sup> People cannot prepare a draft and, if it fulfills the formal requirements, submit it to a popular vote. The only option is the possibility to submit it to the Parliament which considers it during the regular legislative process. There are no legal means, foreseen in the law, for the citizens to influence the Parliament's work. What is more, the Initiative Committee cannot also propose any changes to the proposed draft or even withdraw it, after the draft is submitted (as those rights of the Committee were left to be regulated in the *Sejm's* and *Senat's* statutes, which do not provide directly for such possibilities).<sup>177</sup> However, it has to be noted that some authors are of the opinion, that the representative of the Initiative Committee has a right to introduce changes to the submitted draft.<sup>178</sup> Although the requirement of the collection of 100 000 signatures is not at all strict (taking into account the number of Polish citizens), some other provisions make the initiative ineffective. For instance, Article 10 (2) of the law on popular initiative states that after the Initiative Committee is officially registered, it has only three months to collect the 99 000 signatures (the first 1000 must be collected before the registration as it constitutes one of the prerequisites of the successful Committee registration, according to Article 6 (1) of the law on popular initiative). This kind of a requirement obliges the Committee to act extremely quickly and effectively as on average the amount of signatures collected per day should exceed 1100. These provisions take their toll in practice: statistics show, that since the moment the mentioned act came in force (1999) until the end of 2011, 105 Initiative Committees have been registered, but only 38 of these Committees submitted the required amount of signatures.<sup>179</sup>

Furthermore, the draft prepared by the citizens has to contain all the elements of the draft law that are required from the authorities when they submit the draft. The draft needs to have a justification, it has to analyze in detail its relation to other laws, and it needs to evaluate the potential costs of

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<sup>175</sup> Jerzy Kuciński, *Demokracja przedstawicielska i bezpośrednia w Trzeciej Rzeczypospolitej*, Warszawa 2007, p. 285-286.

<sup>176</sup> Marcin Rachwał, *Demokarcja bezpośrednia*, p. 95; Some authors describe this type of a popular initiative also as an "agenda initiative", see: Theo Schiller/Maija Setälä, *Citizens' Initiatives in Europe Procedures and Consequences of Agenda-Setting by Citizens*, Basingstoke 2012, p. 6-7.

<sup>177</sup> Piotr Uziębło, *Ustawa z 1999 roku*, p. 50 and 65 and Anna Rytel-Warzocho, *Popular Initiatives in Poland: Citizens' Empowerment or Keeping Up Appearances?*, in: Maija Setälä/Theo Schiller (ed.) *Citizens' Initiatives*, p. 219.

<sup>178</sup> Piotr Czerny, *Opinia prawna w sprawie interpretacji art. 14 ust. 2 ustawy o wykonywaniu inicjatywy ustawodawczej przez obywateli*, *Zeszyty prawnicze BAS*, Vol. 3 (35)/2012, p. 65.

<sup>179</sup> <https://obywateledecyduja.pl/merytorycznie/stan-obecny/>, last accessed: 12.08.2013, the rapport prepared by Obywatele Decydują available at: <https://obywateledecyduja.pl/o-inicjatywie/raport/>, last accessed: 16.08.2013.



introducing this law. Further, an analysis verifying the draft law's conformity with the European law has to be prepared.<sup>180</sup> It is needless to say that the State bodies prepare the drafts with the help of their staff and experts. Setting such high standards for the citizens' draft constitutes a barrier to submitting popular initiatives.

Even the positive at first sight provision providing for an exception from the rule of the discontinuity,<sup>181</sup> does not ascertain that the popular law draft will reach the end of the legislature proceedings. This exception (provided for by Article 4 (3) of the law on popular initiative) states that after new elections the Parliament is obliged to continue the works on the people's proposal. As all authors claim, however, the exception from the discontinuity principle applies only to the works of the newly elected Parliament which gathers right after the dissolution of the Parliament, during which term the popular initiative was filed.<sup>182</sup> The Parliament that would be chosen in the elections after next is no longer obliged to continue the deliberations on the popular initiative. Therefore, the Polish Parliament is equipped with a practical tool that can allow it to ignore the people's initiatives. If it does not do so, it is only on grounds of the instrumental use for political ends.

The legislative procedure that applies to the draft law proposed by the popular initiative in general does not differ from the normal legislative process. Although Article 13 of the law on popular initiative states that the first reading of the law draft filed by the people takes place no later than after three months from the date when the draft was filed or, in case the draft law is to be considered by the newly-gathered Parliament elected for the term following the term during which the draft law was submitted to the Parliament, no later than in the six months from the date of the first session of the Parliament, there is no guarantee that the draft law will reach the end of the legislative procedure as there are no other provisions that would set deadlines for the subsequent deliberations of the Parliament. Therefore, it may happen that the second reading of the draft law will never take place due to the prolonged debates in the *Sejm's* commissions. As data shows, up to 2011, ten popular initiatives were not considered further as the commissions could not finish their work before the end of the Parliament's term, following the term of the Parliament during which the draft law was submitted.<sup>183</sup>

Additionally, the citizens' drafts face limitations with regard to the subject-matters of the initiatives. They cannot submit draft laws that regulate areas which are reserved for the sole legislative initiative of the State bodies

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<sup>180</sup> Piotr Uziębło, Ustawa z 1999 roku, p. 54.

<sup>181</sup> According to the discontinuity principle, the Parliament at the end of its term finishes its work on all of the draft laws, even if their legislative process has not ended, instead of handing them over to the Parliament elected for the next term. In Poland this principle is a legal custom, not prescribed by laws. The exceptions to this rule, however, are stated in the laws.

<sup>182</sup> Piotr Uziębło, Ustawa z 1999 roku, p. 53 and Jerzy Kuciński, *Demokracja przedstawicielska*, p. 291.

<sup>183</sup> <https://obywateledecyduja.pl/merytorycznie/stan-obecny/>, last accessed: 12.08.2013, <https://obywateledecyduja.pl/o-inicjatywie/raport/>, last accessed: 19.08.2013.

(eg. the budget). This means that citizens cannot also propose a Constitution amendment by means of a popular initiative, as submitting a draft amending the Constitution is a privilege reserved for the State bodies.<sup>184</sup>

The 2003 law on the nation-wide referendum repeated many of the provisions which had been previously foreseen by the law on referendum of 1995. The facultative referendum on important State matters (provided for by Article 125 of the Constitution) can still be launched, as the Article 60 of the 2003 law states, following the *Sejm* resolution (taken by the absolute majority of votes with a *quorum* of at least half of the Deputies present) or a decision of the President with the *Senat's* consent (given also by the absolute majority of votes with a *quorum* of at least half of the Deputies present). As in the law of 1995, the 2003 law provides that 500 000 citizens can file a motion with the *Sejm* (which is not binding for the *Sejm*), requesting a referendum on important State matters (Article 63 (1) of the 2003 law; the Constitution of 1997 does not provide for such a motion). Article 63 (2) of the 2003 law states furthermore, as the Article 6 (1) of the law of 1995 stated, that the citizens' request for the referendum cannot refer to the matters of State's expenses, revenues, security and amnesty.

A novelty in the Constitution of 1997 and the law of 2003 is the facultative referendum on the ratification of an international agreement. According to Article 90 (2) of the Constitution, the consent to the President's ratification of the international agreement upon which some of the competences of the State bodies are delegated to an international organization or to an international body, has to be given either by the *Sejm* with a qualified majority of votes or by the means of a nation-wide referendum. The decision on the choice of the procedure is reserved to the *Sejm* (hence the citizens have no right of the motion in this matter). If the *Sejm* decides (by the absolute majority of votes with a *quorum* of at least half of the Deputies present) to choose the referendum procedure, the referendum can be subsequently launched either by the *Sejm* itself or by the President with the *Senat's* consent (the procedure provided in the case of the referendum on important matters applies). This provision was foreseen by the Constitution (and subsequently concretized in the law on referendum) for the purpose of joining the European Union.

Both of the above-mentioned referendums are binding if at least half of the eligible voters participates in them. This requirement was also taken from the law of 1995. With regard to the results of the vote, the option which received the majority of the valid votes is chosen (Article 66 (2) of the 2003 law). Article 66 (2) of the 2003 law introduces a change in this matter, compared with the Article 9 (2) of the law of 1995, as the latter provision required for a particular option to be chosen, a majority of votes of the participants in the referendum (therefore, as there might be a cases of voters who participate, but give invalid votes, the previous provision could have led to a situation where a referendum was binding but brought no result).

The last type of a referendum provided for by the Constitution of 1997, and subsequently by the 2003 law on the nation-wide referendum, is the facultative constitution referendum. According to Article 235 (6) of the

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<sup>184</sup> Anna Rytel-Warzocha, Popular Initiatives, p. 214.



Constitution, this referendum can be launched only if the amendment to a Constitution foresees changes to the Parts I (the Republic of Poland), II (the Freedoms, rights and obligations of the humans and citizens) or XII (amending the Constitution) of the Constitution. In such circumstances, those entitled to the right of constitutional initiative (namely 1/5 of the *Sejm's* Deputies, the *Senat*, the President) can file with the Chairman of the *Sejm* a binding request for a constitutional referendum, in which the citizens would ratify the proposed Constitutional amendment. The Constitutional amendment becomes binding if a majority of the voters supported the change. In the case of this referendum, there is no participatory *quorum*.

It should be noted that analogical requirements for the binding force of referendums were provided for by the Constitutional Acts of 1992 (with regard to the ordinary referendum, turnout of at least half of the eligible voters was required and for the constitutional referendum, the majority of the voters voting in favor of the Constitution was required for the new Constitution to be adopted, with no *quorum* requirement).<sup>185</sup> The current law on the nation-wide referendum also provided for provisions that made the participation in referendums easier, such as the possibility to launch a two day-long referendum (this possibility was used in case of the referendum on Poland's accession to the European Union on 7-8 June 2003). This law also regulated extensively the referendum campaign.

The new law on local referendum was enacted on 15 September 2000 (thereafter "the 2000 law").<sup>186</sup> It regulated the direct democracy institutions on the three State levels (community - *gmina*, district - *powiat*, voivodeship - *województwo*) and retained the previous types of the local referendums (referendum on local matters, on self-taxation and recall referendum) and the citizens' right to file a binding motion for launching a referendum. It should be stressed that the Constitution of 1997 and subsequently the law on local referendum, with regard to referendums on local issues, do not require the issues submitted to the votes to be important (as did the previous legislation). The Constitution of 1997 refers only to the issues that concern the local community (*wspólnota samorządowa*) and the law of 2000 on local referendum refers to the local issues that are within tasks and competences of local authorities.

According to Article 5 (1) of the law on local referendum, the local bodies can be recalled only by means of a recall referendum. The referendum on self -taxation, available only on the level of a community,<sup>187</sup> is also an obligatory one. As of 15 February 2013, Article 54 (2) of the law of 8 March 1990 on community government contains the legal base for that<sup>188</sup> (previously the requirement that this referendum was an obligatory one was regulated by Article 7 of the 2000 law on local referendum). With reference to all types of local referendums, the citizens' motion is binding if it is supported

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<sup>185</sup> Stanisław Gebethner, p. 137.

<sup>186</sup> Dz.U.2000.88.985.

<sup>187</sup> Andrzej Jackiewicz, The Constitutional and Statutory Basis for a Local Referendum in Poland, in: Jarosław Matwiejuk/Krzysztof Prokop (ed.) Evolution of constitutionalism in the selected states of Central and Eastern Europe, Białystok 2010, p. 183.

<sup>188</sup> Previously this act of law was called "on local government".

by 1/10 of the citizens in case of the votes on the level of a community or a district or 1/5 of the citizens in case of the votes on the level of voivodeship. The time for the collection of the signatures remains set at 60 days. The referendum on self-taxation or on the matters falling under the competence of local authorities can also be launched upon a decision of the local legislative body (respectively the community, district or voivodeship authority, depending on the referendum type). The referendums are valid if the participation amounts to at least 30% of the eligible voters. The results of the referendums are binding if at least over a half of the valid votes supports a particular option. In case of the referendum on self-taxation, at least 2/3 of the valid votes supporting a particular option is required.

The local referendum on community matters is limited to the issues that are within the competences of the local authorities. Therefore, matters that concern the communities but are to be decided exclusively by other authorities (than the local ones) cannot be subject to local referendums. Further, local referendums cannot be launched on organizational matters relating to the structure of the local authorities. For instance, citizens cannot appoint anyone to a post by means of a referendum, if the popular elections for that post are not provided for. What is more, the local referendum cannot be used as a popular veto that would allow the citizens to repeal a local legal act.<sup>189</sup>

It should be stressed that the introduction of the recall referendum, which exists until today, turned out to be, from the current perspective, the only moment when the people gained access to a political tool which they could use effectively upon their own request. Nevertheless, this did not represent a significant breakthrough, as the law on local referendum was amended on 8 July 2005 so that henceforth, the participation rate in a recall referendum was required to be at least 3/5 of the participation rate recorded when the authority subject to the recall was elected.<sup>190</sup> And even before, the participation rate was not high enough, on average, for those referendums to be binding.<sup>191</sup> The current authorities' suggestion to limit that institution even more<sup>192</sup>, only confirms this view.

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<sup>189</sup> Piotr Uziębło, *Ustawa o referendum lokalnym. Komentarz*, Kraków 2007, a commentary on art. 2 of the act on local referendum (internet version provided by LEX).

<sup>190</sup> Dz.U. 2005.175.1457.

<sup>191</sup> <http://pkw.gov.pl/wybory-w-trakcie-kadencji/informacja-o-przeprowadzonych-referendach-w-sprawie-odwołania-organów-samorządu-terytorialnego-w-latach-1992-2006.html>, last accessed: 14.08.2013.

<sup>192</sup> As described below in the section 4 "Reactive sequence phase approaching?".

#### 4.2.2.1.4 The practical application of the direct democracy institutions

The use of the direct democracy institutions can be characterized currently by a relatively high interest of the citizens and a relatively low support from the authorities for the citizens' participation in the decision-making process. The only nation-wide referendum that was launched in Poland after the constitutional referendum of 1997 was the referendum on joining the European Union, more precisely on the consent to the President's ratification of the international treaty on joining the European Union, concluded in Athens on 16 April 2003 between the European Union and the ten candidate states (including Poland). The *Sejm* decided first, on 17 April 2003, that the consent to the ratification of this treaty would be given not by the lower chamber of the Parliament (which was one of the possibilities), but by the citizens in a referendum. Subsequently, it was decided that the referendum would take place on 8 June 2003. The *Sejm* also stated that the vote would be scheduled over two consecutive days – 7 and 8 June. The decision to prolong the voting over the two days was prompted by the authorities fearing a low participation.<sup>193</sup> As stated earlier, for this kind of a referendum to be binding, the participation of over a half of the eligible voters was required. This choice has proven to be a correct one, as the participation of the citizens was not overwhelming (although higher than in previous votes) and amounted to 58,85%. 77,45% of the participants voted in favor of joining the European Union.<sup>194</sup>

This very small number of nation-wide referendums that took place in Poland does not mean that the citizens are not aware of the existence of this institution. At the end of the 1990s, the citizens' initiatives to launch a referendum were mostly inspired by the political parties, especially by the Polish People's Party (i.e. a request for a referendum on the administrative division of the State in 1998 and two requests for a referendum in 2000 – one on the privatization and one on State forests).<sup>195</sup> This tendency seems to be changing currently. Recently, in March 2012, the request for a referendum concerning the increase of the retirement age, submitted by the trade union NSZZ Solidarność together with 2 000 000 signatures did not convince the *Sejm* to launch the referendum.<sup>196</sup> As numerous media stated,<sup>197</sup> this was

<sup>193</sup> Marcin Rachwał, *Demokracja bezpośrednia*, p. 183.

<sup>194</sup> Ibidem, p. 186.

<sup>195</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 22-23.

<sup>196</sup> <http://niezalezna.pl/42487-wielka-zmiana-konstytucji-sejm-juz-nie-odrzuca-projektow-obywatelskich>, last accessed: 06.08.2013, <http://www.solidarnosc.org.pl/pl/strona-glowna/referendum-emerytalne-1.html>, last accessed: 19.08.2013 and <http://wiadomosci.wp.pl/kat,1342,title,Sejm-odrzuca-wniosek-Solidarnosci-o-przeprowadzenie-referendum-emerytalnego,wid,14377427,wiadomosc.html?ticaid=111276>, last accessed: 19.08.2013.

<sup>197</sup> [http://serwisy.gazetaprawna.pl/edukacja/artykuly/711149,6\\_latki\\_do\\_szkol\\_referendum\\_nie\\_będzie\\_politycy\\_boja\\_sie\\_pytać\\_obywateli\\_o\\_zdanie.html](http://serwisy.gazetaprawna.pl/edukacja/artykuly/711149,6_latki_do_szkol_referendum_nie_będzie_politycy_boja_sie_pytać_obywateli_o_zdanie.html) and

probably due to the fear that the referendum result would oppose the Parliament's decision to change the retirement age.

At the time of writing, a group of citizens wants to launch a referendum on education. They formed an Association *Rzecznik Praw Rodziców* (Ombudsman for Parents' Rights) and in June 2013 submitted a motion for a referendum with nearly 950 000 signatures. The association is against the recent education reform introduced by the Ministry of Education, which would require the 6 year olds to start their elementary education (currently they start school at the age of 7). Apart from this issue, the referendum would also concern other matters, such as the return to the full course of the history in high schools (recently, the history course on the level of high schools was limited) and the liquidation of gymnasiums and the return to the previous education system which consisted of 8 years of primary school education and 4 years of high school education. The Association claims that the schools are not logistically prepared for the 6-years-olds to start their education.<sup>198</sup> On 13 August 2013, the *Sejm*'s Chancellery confirmed that the motion was signed by the sufficient number of citizens. Now the *Sejm* will have to decide on launching the referendum.<sup>199</sup>

The institution of legislative popular initiative is also well known among the citizens. Between 1999 and 2011, 105 initiative committees were registered, out of which 81 prepared the draft law according to the requirements and only 38 managed to collect the requested 100 000 signatures.<sup>200</sup> Ten of those projects were considered by the Parliament in a pace that led to their discontinuation, five were not accepted during the legislative procedure (out of which, four were already rejected in the first parliamentary reading) and eight were enacted by the Parliament, although not always in the exact same form as formulated by the citizens in the initiative. The remaining were still subject to the legislative procedure at the end of 2011.<sup>201</sup> The above-mentioned association *Rzecznik Praw Rodziców* also filed one draft law aiming at amending the educational reform. Their proposal was dismissed in the *Sejm* in June 2012.<sup>202</sup>

Most referendums take place on the local level. While there is no complete data available on the local referendums on local matters and on self-taxation (as there is no nation-wide records of these types of local referendums), it can be estimated that they only amount to about 10% of all referendums that are held on the local level.<sup>203</sup> As far as the local

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<http://www.fakt.pl/Zwiazkowcy-chca-ustawy-o-referendach,artykuly,225249,1.html>, both last accessed: 4.09.2013.

<sup>198</sup> <http://www.oswiata.abc.com.pl/czytaj/-/artykul/zweryfikowano-podpisy-pod-wnioskiem-o-referendum-ws-szesciolatkow>, last accessed: 19.08.2013.

<sup>199</sup> Ibidem.

<sup>200</sup> The rapport prepared by Obywatele Decydują available at: <https://obywateledecyduja.pl/o-inicjatywie/raport/>, last accessed: 16.08.2013.

<sup>201</sup> The rapport prepared by Obywatele Decydują available at: <https://obywateledecyduja.pl/o-inicjatywie/raport/>, last accessed: 16.08.2013.

<sup>202</sup> <http://www.oswiata.abc.com.pl/czytaj/-/artykul/zweryfikowano-podpisy-pod-wnioskiem-o-referendum-ws-szesciolatkow>, last accessed: 19.08.2013.

<sup>203</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 18 and 20.

referendums on self-taxation are concerned, the available data appears to demonstrate that the participation in these kinds of referendums is generally high and amounts often to over 40%.<sup>204</sup>

The participation rate in the referendums on local issues is much lower and often results in invalid votes.<sup>205</sup> In relation to this type of local referendum, practical interpretation difficulties arose in relation to the issues which can be subject to these referendums. These interpretation problems were especially present until 1997, when the local issue was still meant to be "important", which was a very vague term. But even afterwards, the Polish administrative courts and finally the Constitutional Tribunal faced the question on the substantive scope of the local referendums. While the judgments of the administrative courts differed,<sup>206</sup> the Constitutional Tribunal stated in 2003<sup>207</sup> that the provisions regulating the local referendum should be interpreted in a way that they do not preclude the referendums on important issues relating to the social, cultural or economic bonds uniting the community, which are not exclusively within the competences of other public authorities.

The National Election Commission (*Państwowa Komisja Wyborcza*) collects the data on recall referendums on the local level, therefore in relation to this type of local referendums the information on its use should be complete.<sup>208</sup> According to the Commission's statistics, 599 local recall referendums were held between 1992 and 2012, out of which 71 were valid and binding. This amounted to less than 12% of valid votes. In years 2000 and 2001, there was a significant increase in the use of this institution, as during this period 178 recall referendums were held (out of which only 21 were valid). This might have been caused by an increased activity of local communities, which gained new powers after the administrative reform of 1999.<sup>209</sup>

As stated at the beginning of this section, the reproduction phase that followed the critical juncture of 1980 and its subsequent production phase, can be described as a period when the same institutional pattern keeps being repeated. Over the years, the laws on direct democracy mechanisms were

<sup>204</sup> Jerzy Kucinski, *Demokracja przedstawicielska i bezpośrednia w Trzeciej Rzeczypospolitej*, Warszawa 2007, p. 279.

<sup>205</sup> Jerzy Kucinski, *Demokracja przedstawicielska*, p. 281.

<sup>206</sup> Ibidem, p. 280

<sup>207</sup> The Constitutional Tribunal verdict of 26 February 2003, K 30/02.

<sup>208</sup> <http://pkw.gov.pl/wybory-w-trakcie-kadencji/informacja-o-przeprowadzonych-referendach-w-sprawie-odwolania-organow-samorzadu-terytorialnego-w-latach-1992-2006.html>, <http://pkw.gov.pl/kadencja-2010-2014/wybory-i-referenda-lokalne-w-trakcie-kadencji-organow-jednostek-samorzadu-terytorialnego-lata-2011-2012.html>, <http://pkw.gov.pl/kadencja-2006-2010/informacja-o-zarzadzonych-i-przeprowadzonych-referendach-w-sprawie-odwolania-organu-samorzadu-terytorialnego-przed-uplywem-kadencji-kadencja-rad-2006-2010-.html>, last accessed: 19.08.2013.

<sup>209</sup> Andrzej K. Piasecki, Twenty years of Polish direct democracy at the local level, in: Theo Schiller (ed.) *Local Direct Democracy in Europe*, Wiesbaden 2011, p. 130.

amended and even replaced by new laws ones, but no change or development of the overall concept of the direct democracy in Poland can be observed throughout this time. This tendency of the reproduction of the institutional pattern is also reflected in the practical application of these mechanisms. The authorities keep denying the people the right to make important decisions (except for the moments when they would like to share the responsibility for particular decisions with the population). On the one hand, citizens continuously try to make use of the direct democracy mechanisms (by submitting popular initiatives or requests for referendums) but, on the other hand, they often fail to participate in the votes, especially at the local level.

### 4.3 Outcome

The concept of the direct democracy institutions established in 1987, following the 1980 events, is still present until today in the legal framework of the referendum and popular initiative. As mentioned earlier, the Communist regime introduced the institutions of direct democracy into the legal system in a response to the tensions in the Polish society. The idea was, however, to give people merely an impression that their voice mattered and that they could take part in the decision-making process. In fact the institutions allowed the people's voice to be heard only if the authorities decided to listen to it. This tendency was also preserved after the fall of Communism, up until now. In general, it was assumed that the legislature did not "trust" the institutions of direct democracy.<sup>210</sup> The analysis of the law on referendums fully confirms this thesis. In cases of both, the referendum and the popular initiative, the *Sejm* reserved to itself the final decision on continuing the direct democratic procedure after the motions were filed by the citizens.

Today, it is noticeable how both the executive and the legislature still resist sharing power with the people. They do not support the idea of the Nation directly participating in the decision-making process. The *Sejm* rejects every request for the referendum filed by the Deputies and by people, even if the number of signatures collected significantly exceeds the amount required by law.

Further, the institution of popular initiative does not provide for an efficient tool allowing the people to propose legal drafts. Citizens can submit a precisely formulated draft law, but they have no further effective possibility to participate in the legislative process nor to verify or influence the outcome of that process. The only significant exception to the regular legislative process is that the general rule of discontinuity of parliamentary deliberations does not apply to the proposal made by means of popular initiative. However, even this exception, as shown above, is not completely effective.

On the local level, the use of referendum, especially the recall one, is much more popular, due in part to the fact that citizens are empowered to file

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<sup>210</sup> Andrzej K. Piasecki, *Demokracja bezpośrednia*, p. 11 citing: M. Jabłoński, *Wynik referendum a zasada dyskontynuacji prac Sejmu*, *Acta Universitatis Wratislaviensis*, Vol. XLI/1998, p. 115.



a binding motion to launch it. Nevertheless, the participation requirements render the vast majority of local referendums invalid. The high participation requirements of the local referendums give undue weight to the people who chose not to participate in them. Therefore, the outcome of the referendums depends in fact on these citizens who have no interest in its result.

It can therefore be argued that the Polish authorities still treat referendums as plebiscites, namely as a way to verify public support for their decisions and subsequently to benefit from that knowledge in the next parliamentary elections. Alternatively, they use this institution only to gain the popular legitimization for their actions (such as in the case of the constitutional referendum or the referendum on the accession to the European Union) and to share the responsibility for those choices with the people. In such cases, the authorities launch referendums only when the result of the vote can be easily foreseen.

#### **4.4 Phase of reactive sequences approaching?**

The process of the reproduction of the institutions of direct democracy, in which the inefficient legal instruments are being duplicated, seems to be still developing. A question could be therefore posed if the current phase already constitutes the outcome of the 1980 critical juncture with regard to the institutions of direct democracy, or whether it is rather the beginning of the next phase, namely reactive sequences. Taking into account the citizens' growing interest in these instruments, it cannot be excluded that eventually the direct democracy laws will evolve in a way to allow the people to effectively take part in the decision making process. It is therefore possible that the people's discontent with the way in which their initiatives (both legislative and motions for referendums) are treated by the *Sejm* will eventually initiate a phase of reactive sequences which could result in changes in the current design of the direct democracy institutions.

Since 2004, an NGO - The Civil Affairs Institute (*Instytut Spraw Obywatelskich*) - actively promotes the broadening of the citizens' rights to participate in the decision-making process.<sup>211</sup> In 2011, a report on the use of the popular initiative was published, where the faulty provisions affecting the use of this institution were pointed out.<sup>212</sup> The same year, the Institute published also a collection of ten proposals prepared by the Polish constitutional law experts, aiming at finding legal solutions to improve the functioning of direct democracy in Poland.<sup>213</sup> For instance, the *Sejm's* competence to refuse launching a referendum requested by the people has been there criticized.<sup>214</sup>

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<sup>211</sup> <http://inspro.org.pl/about-us/>, last accessed: 06.08.2013.

<sup>212</sup> <https://obywateledecyduja.pl/o-inicjatywie/raport/>, last accessed: 06.08.2013.

<sup>213</sup> Bogusław Banaszak/Jarosław Zbieranek, *Ankieta konstytucyjna*, Łódź 2011.

<sup>214</sup> [http://orka.sejm.gov.pl/Druki7ka.nsf/Projekty/7-020-681-2013/\\$file/7-020-681-2013.pdf](http://orka.sejm.gov.pl/Druki7ka.nsf/Projekty/7-020-681-2013/$file/7-020-681-2013.pdf), last accessed: 06.08.2013 citing: K. Skotnicki. in: Bogusław



The current opposition, namely the Law and Justice Party (*Prawo i sprawiedliwość*) already announced that it wanted to take measures to reform the direct democracy institutions. On 17 June 2013, the party submitted a draft law amending the Constitution. The Deputies opted for the introduction of a binding popular initiative to launch a referendum. According to the proposal such an initiative would require 1 000 000 signatures for its validity.<sup>215</sup> This way the *Sejm* could no longer ignore the people's will to state their opinions by means of a referendum. However, a referendum could not be launched with reference to matters such as a Constitutional amendment, State budget, State defense, participation in military operations and amnesty. The Deputies also proposed an amendment to the popular initiative provisions, stating that a draft law submitted by the citizens could not be rejected by the *Sejm* in the first reading. They also broadened the scope of the popular initiative: according to their proposal, 1 000 000 citizens could submit a draft amending the Constitution. These citizens would also be entitled to file a binding request to launch a ratification referendum on the Constitution amendment.<sup>216</sup> This proposal definitely takes into consideration the disadvantages of the legislation currently in force. Still, it could be argued that the draft contains the requirements that are too strict. For instance, it leaves it to the Parliament to establish in the legal acts the time within which the signatures should be collected. If this proposed Constitution amendment is passed, only the amendments to the laws on the nation-wide referendum and on the popular initiative will determine if the proposed changes are in fact a step forward in the evolution of the direct democracy institutions. If, for instance, the recalled provisions on the time frame within which signatures must be collected will not guarantee sufficient time for their collection, the proposed amendment to the Constitution will be meaningless.

The attitudes towards direct democracy institutions vary significantly between different political actors. For instance, the President has started to mention more often that the law on local referendum should be amended by limiting the institution of the recall referendum. This is the effect of the relatively frequent use of this type of vote by the citizens. The President suggested that the recall referendum could only be valid if the participation rate was equal to the participation recorded when the authority subject to the recall was elected<sup>217</sup> (currently the required *quorum* amounts to 3/5 of the election participants). Such a high participation requirement would make the recall referendum a meaningless institution.

Further, the behavior of the current governing party, facing a local recall referendum aimed at the President of the City of Warsaw (and a vice-chairman of the Civic Platform party), is highly undemocratic. The Prime Minister began to encourage the citizens of Warsaw not to go to the popular

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<sup>215</sup> Banaszak/Jarosław Zbieranek (ed.), *Ankieta konstytucyjna*, Łódź 2011, p. 108.  
<http://niezalezna.pl/42487-wielka-zmiana-konstytucji-sejm-juz-nie-odrzuci-projektow-obywatelskich>, last accessed: 06.08.2013.

<sup>216</sup> [http://orka.sejm.gov.pl/Druki7ka.nsf/Projekty/7-020-681-2013/\\$file/7-020-681-2013.pdf](http://orka.sejm.gov.pl/Druki7ka.nsf/Projekty/7-020-681-2013/$file/7-020-681-2013.pdf), last accessed: 06.08.2013.

<sup>217</sup> [http://metromsn.gazeta.pl/Wydarzenia/1,127307,14098174,Odwolanie\\_wladz\\_bedzie\\_niemozliwe\\_Nowy\\_projekt\\_referendow.html](http://metromsn.gazeta.pl/Wydarzenia/1,127307,14098174,Odwolanie_wladz_bedzie_niemozliwe_Nowy_projekt_referendow.html), last accessed: 06.08.2013.

vote<sup>218</sup> (instead of seeking to enhance the participation and voting in favor of the Civic Platform). Soon afterwards, the President of Poland joined this campaign (despite the fact that he is meant to be politically neutral) and announced that he himself would not participate in this referendum.<sup>219</sup>

Recently, one of the Deputies of the Civic Platform sent an official letter to the National Election Commission trying to argue that some of the signatures collected in favor of launching the referendum should be considered void by the said Commission, as they were collected during cultural and sport events.<sup>220</sup> The collection of signatures during such events, according to this Deputy, puts into question the capability of the voters to make a deliberate decision with regard to signing the referendum's lists. This Deputy ignores, however, the fact that the Polish referendum law does not provide for any limits concerning the places where the signatures should be collected.

Therefore, taking into account the signs of the growing interest of the citizens in the direct democracy institutions and the hostile attitude of the authorities to the citizens engagement, it may be assumed that if this tendency prevails, possibly the citizens will eventually manage to enforce on the authorities changes in laws on direct democracy institutions, for instance by electing Deputies who understand the people's eagerness to participate in the decision-making process. Nonetheless, it will be possible to state so only from a time perspective.

## 5 Conclusions

Due to its tempestuous history, Poland does not have a long tradition of stable democracy. This can also be said about the legal framework of the direct democracy institutions. The method of critical junctures and path-dependence helped illustrating the reasons behind its development.

While the institutions of direct democracy were proposed in numerous Constitution drafts, the Polish *Sejm* did not use the opportunity to introduce them into the Constitutional system in 1921, as the majority of the Deputies thought that they could lead to ineffective decision-making. Besides, the newly-created Polish system after the First World War was inspired by the French political system which did not favor direct democracy. The introduction of direct democracy could not stop the transformation of the parliamentary system into an authoritarian one at that time. Nevertheless, this could have played a significant role in forming the citizens' sense of civic responsibility.

The subsequent Communist regime, which was the final result of the Second World War, was even more disastrous with regard to the participation of the citizens in the decision-making process. This totalitarian political system was based on the idea of suppressing human rights and therefore did not promote any kind of citizens' initiatives or power-shearing. It caused,

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<sup>218</sup> <http://www.rp.pl/artykul/1030602.html>, last accessed: 09.08.2013.

<sup>219</sup> <http://wiadomosci.wp.pl/kat,1342,title,Prezydent-nie-wezmie-udzialu-w-referendum-w-Warszawie-Politycy-oburzeni,wid,15879793,wiadomosc.html?ticaid=111185>, last accessed: 09.08.2013.

<sup>220</sup> <http://www.rp.pl/artykul/1037488.html>, last accessed: 09.08.2013.

however, the ongoing strikes and protests which in the end led the political leaders to apply a policy of appeasements and to introduce the institutions of direct democracy in a limited scope.

The today's legal framework of direct democracy is still strongly rooted in the concept applied in 1987, which was influenced by the events of 1980. The small changes that were introduced over the years (such as the introduction of an indirect legislative popular initiative and of a non-binding popular initiative to launch a referendum), cannot be mistaken for progressive developments. The current data on the use of direct democracy shows that the authorities still want to keep to themselves the right of launching popular votes and want to benefit from that prerogative when they need the citizens' support (and they can foresee that this support will be given). However, every time when a popular initiative to launch a referendum is submitted, the authorities do not allow it, probably fearing that the citizens will disagree with them. Further, when the legislative popular initiatives are submitted, only very few of them are eventually adopted by the Parliament. In this context, the statements of the politicians that the citizens are not able to make a conscious decisions<sup>221</sup> or even to consciously sign the petition for launching a referendum if the signatures are collected during sport or cultural events are meaningful.

Naturally, it can also be argued that there is no need to change the structure of the institutions of direct democracy. If the electorate is unsatisfied with the authorities' decisions on launching the referendums or on not passing the laws proposed by the people, it can consequently vote against these particular Deputies in the next elections. The evaluation of the current state of the direct democracy in Poland is not unambiguous and may vary, depending on the model of the direct democracy used for the comparison. Nevertheless, it can be assumed that the introduction of the direct democracy mechanisms with very high requirements for their use can only lead to dissatisfaction among the citizens.

Does the presented development of the direct democracy institution mean that these institutions introduced in 1987 were in fact progressive? To some extent, this appears to be the case. The critical juncture of August 1980 forced the Communist authorities to make a step in the direction of including the citizens in the decision-making process and the institutions introduced were therefore derived from the democratic system. It is noticeable that they differed from the institutions which were considered to be directly democratic by the Socialist doctrine (namely: the elections, the participation in various State-controlled organizations, etc.). Nevertheless, those institutions introduced in 1987 were not meant for the citizens to be equipped with tools that could at any time allow them to contradict the will of the authorities. Until today, those mechanisms serve to keep up appearances and to create an impression that citizens can express their views.

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<sup>221</sup> Anna Rytel-Warzocha, *Popular Initiatives*, p. 226.

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